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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 848

MARY W. STEWART, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondents.

BRIEF OF PETITIONERS

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In the Supreme Court of the United States

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No. 848

MARY W. STEWART, ET AL.,
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UNITED STATES OF AMERICA,
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BRIEF OF PETITIONERS

I.

OPINIONS OF THE COURTS BELOW.

The opinion of the District Court is officially reported in 29 F. Supp. 59 and appears in the record (R. I—165-176), and the opinions of the Circuit Court of Appeals for the Ninth Circuit are officially reported in 121 F. (2d) 705 and appear in the record (R. V—148-169).

II.

STATEMENT OF JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, U.S.C., Title 28, §347(a).

2. The decree of the Circuit Court of Appeals for the Ninth Circuit to be reviewed was entered June 30, 1941. (R. V—169-170) Petition for rehearing was filed July 28, 1941 and was denied October 16, 1941. (R. V—170)

III.

CONCISE STATEMENT OF THE CASE.

This is a suit by the United States to cancel three federal land patents and to take from petitioners something over 4,000 acres of land, shown in red upon the map opposite. Prior to the bringing of this suit, these lands had been in the undisturbed and undisputed possession of petitioners and their predecessors for 40 years. At the commencement of this action the patents sought to be cancelled were 34, 20 and almost 6 years old, respectively.

These were originally waste marsh lands, similar to the large areas of marsh land shown in blue upon the map. They were reclaimed and improved by the private owners, at a cost to petitioners themselves, exclusive of the cost of acquisition and of reclamation and improvement by their predecessors, in excess of $300,000. The original reclamation and all of the work done by petitioners was done after this Court, in a prior litigation, had affirmed that title to these lands had passed to the State of California,

petitioners' predecessor in interest, under the Swamp Land Act of 1850. *San Francisco Savings Union v. Irwin* (1886) 28 Fed. 708, affirmed in *Irwin v. San Francisco Savings Union* (1890) 136 U.S. 578. All of the petitioners bought and improved their lands after the United States had issued patents to the State of California, solemnly affirming the title thus adjudicated. The government does not propose to pay or reimburse petitioners, either for the lands themselves or for the reclamation work done or for the improvements made. It proposes to ignore the prior adjudication of title by this Court, to repudiate its own land patents and to wrest from the private owners the lands they have so long held and enjoyed, without even a pretense of equity or justice.

The history of these lands is briefly this:

In 1841 Juan B. Alvarado, the then Constitutional Governor of the Department of the Californias, granted to Victor Castro a tract of land in the bay of San Pablo, which is an arm of San Francisco Bay, named "La Yegua" or Mare Island. (Ex. D-1, R. II—384, V—38-40) The grant was, of course, made by the Mexican Government under the Mexican law and, as we shall later show, under that law the grant only embraced the area lying above the line of highest high-water throughout the year, which confined it to the high land which bears the name "Mare Island", as shown upon the map, *supra*. This explains why it is that the high land, and the high land alone, was named or called Mare Island. All of the evidence shows that the only area ever known as or called "Mare Island" was this same high land, including none

of the lands in controversy here, as the trial court found. (R. I—261)

G. W. P. Bissell and William H. Aspinwall, who had purchased Castro's claim to Mare Island, in 1852 presented the claim for confirmation before the Board of Land Commissioners established under the Act of 1851 for the settlement of private land claims in the State of California.[1] (Ex. D-1, R. II—384, V—4-6) Their petition was for the confirmation of the place "called 'Isla de la Yegua'" (Ex. D-1, R. II—384, V—4) or Mare Island, which had been granted to Castro. The only evidence before the Board as to what constituted Mare Island was the testimony of General Vallejo, who testified:

> "It is an Island in San Pablo Bay at the mouth of Napa Creek. The Island is some two and a half miles in length. It is irregular in its width and contains about a half a league of land, a little more or less." (Ex. D-1, R. II—384, V—22-23)

A reference to the map opposite page 3, *supra,* will show that this describes with considerable accuracy the island known as Mare Island, as distinguished from the lands here in controversy. Mare Island is at the *mouth* of Napa Creek or River and is almost exactly two and a half miles long. These facts were, of course, well known to General Vallejo, whose home lay just across Napa River at the point now occupied by the town bearing his name. Nowhere in the confirmation proceedings was any question raised as to the extent of Mare Island—the only question being, as the record will show (Ex. D-1, R. II—384, V—

[1]Act of March 3, 1851, 9 Stats. 631.

1-71), whether the grant to Castro was valid or fraudulent. With some difficulty the Board concluded that the grant could not be rejected as a forgery—although there were many suspicious circumstances (Ex. D-1, R. II—384, V—67-69)—and accordingly the claim was confirmed. (Ex. D-1, R. II—384, V—70)[1]

The confirmation decree, in describing the land confirmed, provided:

> "The place of which confirmation is given is situate in the Bay of San Francisco and is called 'Isla de la Yegua' or Mare Island and being an Island is bounded by the water's edge." (Ex. D-1, R. II—384, V—70)

The Court will observe that, conformably with the record before the Board, what was confirmed was the place *"called"*[2] 'Isla de la Yegua' or Mare Island."

In 1869 at the request of one Jacob C. Hinckley all of the lands in controversy here and certain others were surveyed by the County Surveyor of Solano County preparatory to their sale by the State of California under the

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[1]It is perhaps significant that the United States bought out Bissell and Aspinwall in January, 1853 (Ex. H, R. II—398, III—70-74), before the case was tried before the Board; that the depositions upon which the case was submitted to the Board were very cursory, to say the least (Ex. D-1, R. II—384, V—7-32); and that after the case was automatically appealed under the statute to the district court the decree of the Board was, along with the decrees in thirty-seven other cases, confirmed by consent of the United States Attorney (Ex. D-2, R. II—384, V—141) without any trial or other consideration of the merits by the court. Interestingly, no final decree was entered by the district court until some 73 years later, when, on the eve of filing this suit, the government proceeded *ex parte* to procure the entry of a decree *nunc pro tunc* on April 15, 1930. (Ex. D-2, R. II—384, V—88-90)

[2]All emphasis throughout this brief is ours unless otherwise expressly noted.

Swamp Land Act, this survey being commonly known as Swamp and Overflowed Lands Survey 569. (Ex. 4, R. II—648, IV—37) The purchase price was paid and the lands were patented to John W. Pearson, assignee of Hinckley, in 1874. (Ex. 5, R. II—651, III—185-188) Petitioners are the successors in interest of Pearson. It is stipulated that whatever title passed to the State of California or to any of its successors in interest is now vested in petitioners. (R. II—644)

Notwithstanding that the only land ever known as or called Mare Island was the high land, and notwithstanding that this was all that was ever granted to Castro by the Mexican authorities, in the 1880's the United States laid claim to the swamp lands to the north-west of Mare Island, the claim being identical with the claim that is now made. There was evidence that these swamp lands to the north-west of Mare Island were slightly above mean or ordinary high-water mark—although below the line of highest high-water of the Mexican law—and the Government asserted that all of this vast area was included in the confirmation as a part of Mare Island and therefore did not pass to the State of California under the Swamp Land Act, but belonged to the United States.[1] Acting upon this claim, the Commandant of the Mare Island Navy Yard ousted petitioner's predecessors, whereupon they brought ejectment against him. The Commandant was represented by the United States Attorney and a spe-

[1]The area of the highland, which was granted, even if we include the fringe of tule marsh on the side toward Vallejo, was only some 900 acres (R. II—719), whereas the area claimed by the Government as constituting Mare Island would exceed 5200 acres or over five times as much.

cial assistant employed by the government (Ex. 20, R. I—177, II—667, III—203) who set up the government's claim of title as a defense. (R. III—305-308) Mr. Justice Field, sitting in circuit with Circuit Judge Sawyer, held that these swamp lands were not a part of Mare Island, were not embraced within the Castro grant and had passed to the State of California under the Swamp Land Act. *San Francisco Savings Union v. Irwin* (1886) 28 Fed. 708. The case was carried to this Court upon a writ of error sued out at the direction of the Acting Attorney General of the United States (Ex. 21, R. I—177, II—669, III—204) and this Court affirmed the judgment below upon the authority of *Wright v. Roseberry* (1887) 121 U.S. 488. See *Irwin v. San Francisco Savings Union* (1899) 136 U.S. 578.

This result was accepted as final by everyone. Previously, at the request of the Attorney General of the United States (Ex. 40, R. II—708-709, III—273-284), the State had ceded jurisdiction of Mare Island, including its swamp and tide lands, to the United States so that the United States could erect a navy yard, but by express provision this cession extended only to the northerly end of the high land (Cal. Stats. 1854, Chap. XLIII, p. 48, §2) and excluded all of the lands in suit here. And as early as 1885 a portion of the land was sectionized and a township plat thereof officially approved. (Ex. 41, R. II—711, IV—51) This township plat was followed, after this Court's decision in the *Irwin* case, by a patent dated June 5, 1896 from the United States to the State of California covering all that portion of Survey 569 shown upon the plat. (Ex. 6, R. II—651, III—189)

Toward the end of 1895 Dr. L. E. Cross purchased the swamp lands constituting Island No. 1 and forthwith took steps to levee and reclaim them. (R. II—524-525, 720) To make sure that there would be no controversy with the government, Dr. Cross wrote to Admiral Kirkland, the Commandant of the Navy Yard, under date of December 5, 1896 as follows

> "Sir: I intend within the next thirty days to begin the reclamation of the tule land north of the Government boundary line, and desiring no conflict with the Government or its representatives I would respectfully ask that I may, at my own expense, employ a Surveyor to locate said lines for me. I have asked Mr. Simonton of the Y & D Deptmt to do the work for me, which he refuses to do without your knowledge and consent,—he being employed by the Government would naturally look out for the Government's interest as well as mine." (R. II—690-691)

To this, Admiral Kirkland replied:

> "In response to your letter of the 5th inst., you are informed that we have notified the Department of Yards and Docks to grant Mr. Simonton permission to make the survey desired by you. At the same time I have directed the Civil Engineer of the Yard to extend all necessary information and keep an eye on the work in order that the boundary line once established may be done so accurately that no objections will ever be raised by either of the parties interested therein." (R. II—692)

The work of leveeing the land took two years (R. II—686) and cost in excess of $80,000 (R. II—689). The work was done with a large clam shell dredge, using at

times a 100-foot and at times a 120-foot boom (R. II—687) and necessarily was done with the knowledge of the Government.

In 1904 another portion of Island No. 1 was sectionized and the township plat thereof approved (Ex. 42, R. II—712, IV—52) and on February 7, 1910 those portions of Island No. 1 shown on that plat were patented to the State (Ex. 7, R. II—651-652, III—192). Township plats covering the rest of the land involved in this suit were approved in 1923 (Exs. 43 and 44, R. II—712, IV—53 and 54) and the land was patented to the State on April 26, 1924 (Ex. 8, R. II—652, III—196). This action upon the part of the government was taken advisedly. The record shows that the Land Department communicated with the Navy Department and ascertained that as a result of the *Irwin* litigation the Navy Department made no claim to these lands, and accordingly they were patented. (Ex. 37, R. II—707, III—260-265)

This action by the Land Department was exactly in line with that taken by the Navy Department on the ground. In 1914 that Department erected the present boundary fence between the lands involved in this suit and those claimed by the Navy (i.e., between the lands in Swamp Land Survey 569, which were litigated in the *Irwin* case, and those in Swamp Land Survey 34, which were involved in the *O'Donnell* case) and that fence has been maintained by the Navy ever since. (R. II—588) It was also in line with the action of the Navy Department in recording in the Recorder's Office of Solano County on November 10, 1913, in Book 5 of Maps at

page 4, a formal map of the Mare Island Navy Yard Reservation, in accordance with the Act of the California Legislature of March 2, 1897 (Cal. Stats. 1897, p. 51) ceding jurisdiction of lands occupied by the United States for military purposes or defense. This map (Ex. 9, R. II—652-653, IV—38) shows that the reservation did not cover any of the lands involved in this suit, but stopped at the Navy Yard fence.

All of the petitioners purchased their lands after patents had issued and at a cost, including improvements, in excess of $300,000. West End Land Company bought its property in March, 1923, over thirteen years after the land was patented. It paid $27,000 for the land and, up to 1929, had expended in excess of $25,000 in improvements. (R. II—684) Field & Tule Land Company bought its holdings some twenty years before the trial, about seven years after patent had issued. (R. II—680) This holding contained about 500 acres, for which the company paid $25 or $35 an acre. (R. II—680-681) Its improvements cost well in excess of $35,000. (R. II—682) Bay Land Company bought its land in 1920, ten years after patent had issued. Its holding contained 631 acres, for which it paid $35 per acre. Its improvements cost an additional $22,540. (R. II—717) Sears Point Toll-Road Co. bought its right-of-way lands, extending the whole length of Island No. 1, between 1926 and 1928 and built 7.3 miles of road at a cost in excess of $180,000. (R. II—678-679) James Irvine purchased his lands in 1928, for which he paid approximately $100,000, and in addition spent $26,000 on improvements. (R. II—685-686) Mary W. Stewart also purchased her lands in 1928, paying

$18,000, in addition to which she spent $11,550 for improvements. (Ex. 45, R. II—722, III—285-286)

In 1930, without warning or explanation or showing of equity, and like a bolt out of the clear sky, the government brought this suit for the purpose of taking from petitioners these lands, which eveyone, including the government, had recognized as privately owned for forty years. By this suit the government seeks to ignore the decision in the *Irwin* case, to repudiate its solemn patents, to evade the plain bar of the statute of limitations as to the patents issued in 1896 and 1910, and to set itself above the law and the principles that govern a court of equity in the granting of equitable relief. The question presented is not whether the United States may have these lands if it needs them, but whether it may dispossess the petitioners without paying for their lands.

The trial court held, following the *Irwin* case, that the lands in controversy were not a part of Mare Island, were not embraced within the Castro grant (R. I—261), and had passed to the State under the Swamp Land Act (R. I—259). The trial court further held that as to the patents which were issued 34 and 20 years before the suit was brought the action was barred by the federal six-year statute of limitations, U.S.C., Title 43, §1166 (R. I—278), the case being ruled by the decision of this Court in *United States v. Chandler-Dunbar Water Power Co.* (1908) 209 U.S. 447 (R. I—169). The court further indicated, without deciding (R. I—169-176), that the position of the government was so grossly inequitable that the court would not grant equitable relief.

The Circuit Court of Appeals for the Ninth Circuit, one judge dissenting, reversed. Rejecting the holding of the trial court and the decision in the *Irwin* case alike, two of the judges held that by virtue of the confirmation decree the lands should be taken to be within the Castro grant and therefore did not pass to the State under the Swamp Land Act. (R. V—154-158) The majority further held, in plain disregard of the *Chandler-Dunbar* decision, that the federal six-year statute of limitations was not applicable (R. V—161-162), though the case is obviously within the exact language of the statute:

> "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents." (U. S. C., Title 43, § 1166)

And finally, though the court was sitting as a court of equity and though the result was admittedly inequitable, —indeed, was so grossly inequitable that the concurring opinion suggested Congressional remedial action (R. V—166)—the court concluded that it was powerless to stay its own hand from doing inequity (R. V—163-167). The holding of the majority is that the United States, unlike any other litigant, is free to come into a court of equity and demand, in a suit brought by it against its own citizens, that the court shall exercise its extraordinary equitable powers for the purpose of granting relief which is grossly inequitable and unjust.

As indicated, one of the judges dissented. In accordance with the *Irwin* decision, he held that the land was not a part of Mare Island and therefore passed to the State under the Swamp Land Act. (R. V—167-168)

To avoid possible confusion it should be said that while this case and *United States v. O'Donnell* (1938) 303 U. S. 501, are sometimes referred to as companion cases —because they both involve questions relating to the extent of Mare Island—the fact is that the two cases are concerned with different lands and the issues decided in the *O'Donnell* case are entirely different from those presented here. The title to the lands involved in the *O'Donnell* case was not adjudicated in the *Irwin* case; nor had the private claimants ever been in possession of the land; nor had they bought after or in reliance upon the government's patents. In the *O'Donnell* case the trial court found that the lands there involved were a part of Mare Island, whereas the finding here, by the same trial judge, is just the other way. Moreover, in this case, unlike the *O'Donnell* case, there was no concurrence by the courts below upon the finding. In that case the suit was brought within the period of the statute of limitations, while here one of the patents was 34 years old and another was 20 years old when suit was brought. In the *O'Donnell* case the equities were all with the government—here it is conceded in the concurring opinion that the result of the majority's decision is so "grossly inequitable" as to warrant Congressional remedial action.

IV.

SPECIFICATION OF ERRORS.

The errors intended to be urged by petitioners are that the United States Circuit Court of Appeals for the Ninth Circuit erred

(1) In holding that it was free to ignore the adjudication of the identical title involved in this case and to refuse to follow the decision in *San Francisco Savings Union v. Irwin* (1886) 28 Fed. 708, affirmed by this Court in *Irwin v. San Francisco Savings Union* (1890) 136 U. S. 578.

(2) In holding that the federal six-year statute of limitations (U. S. C., Title 43, §1166) does not apply to the swamp land patents which were issued in this case 34 and 20 years, respectively, before suit was brought.

(3) In holding that, when the United States comes into a court of equity as a litigant seeking equitable relief against its patents, it is entitled to a preferred position over private litigants and is not subject to the ordinary principle that a court of equity will not do inequity.

(4) In holding that the United States may not be estopped, however unjust and inequitable its claim may be.

(5) In holding, contrary to the finding of the trial court supported by compelling evidence, that the lands in suit were a part of Mare Island and were embraced within the confirmed Castro grant.

V.

SUMMARY OF ARGUMENT.

The argument of petitioners may be summarized as follows:

1. The title to the identical lands here involved was previously adjudicated in an action against an officer of the federal government, who defended upon the basis of the same claim of title in the United States as that made here. It was there held that the United States had no title and that the lands had passed to the State under the Swamp Land Act. *San Francisco Savings Union v. Irwin* (1886) 28 Fed. 708, affirmed in *Irwin v. San Francisco Savings Union* (1890) 136 U. S. 578. That adjudication stood unchallenged for a period of 40 years prior to the bringing of this suit, during which time it was respected and relied upon by everyone having anything to do with the matter. Upon the strength of that decision the lands were patented to the State and thereafter hundreds of thousands of dollars were invested by petitioners in purchasing and improving the land, all with the knowledge of the government. Upon the plainest principles of justice, and pursuant to the settled rule of *stare decisis*, the Circuit Court of Appeals was duty-bound to follow the earlier decision, as the trial court did, and erred in refusing to do so.

2. Swamp land patent No. 72, which the government asks be cancelled, was issued in 1896 or 34 years before this suit was brought and swamp land patent No. 152, which the government also seeks to cancel, was issued in 910 or 20 years before this suit was brought. As to these

patents the suit is plainly barred by the federal six year statute of limitations. Act of Congress March 3, 1891, §8 (26 Stats. 1095, 1099, U. S. C., Title 43, §1166) *United States v. Chandler-Dunbar Water Power Co.* (1908) 209 U. S. 447.

3. In this case the United States has come into a court of equity, seeking affirmative equitable relief against its own land patents. The circumstances of the case are such that granting the relief thus sought would be unjust and inequitable in the extreme. Indeed, one of the majority below, though concurring in the reversal of the trial court, was so impressed with what he said was the "grossly inequitable" result that he suggested there should be Congressional relief. Petitioners contend that the United States, like any other litigant, is subject to the governing principles of equity and cannot have affirmative relief in equity which is grossly inequitable.

4. The circumstances of this case are such as clearly give rise to an equitable estoppel. The holding of the court below that the sovereign may not be estopped is contrary to the repeated decisions of the federal courts.

5. The trial court, in passing upon the merits of the case, found that the lands here involved were not a part of Mare Island, were not granted to Castro and were not embraced within the confirmation decree and hence did not belong to the United States. This holding—which accorded exactly with the decision of Mr. Justice Field and Judge Sawyer in the *Irwin* case and with the views of Judge Mathews in this case—is supported by the great weight of the evidence. The majority below, without rul-

ing that the lands were in fact a part of Mare Island or were in fact granted to Castro, have set aside the trial court's finding upon the ground that the lands were embraced within the confirmation decree. In so doing they have not only disregarded the express mandate of Rule 52(a) of the Rules of Civil Procedure that "findings of fact shall not be set aside unless clearly erroneous," but have misconstrued the confirmation decree and brought about a result that is so harsh as to be unconscionable.

ARGUMENT.

I.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISION IN THE *IRWIN* CASE, IN WHICH THE TITLE TO THE IDENTICAL LANDS WAS ADJUDICATED. THE COURT BELOW ERRED IN REFUSING TO FOLLOW THE EARLIER DECISION.

We are here concerned with land titles emanating from the federal government, upon which patents have issued. This Court has on more than one occasion remarked upon "the immense importance and necessity of stability of titles dependent upon these official instruments".[1] The importance is, of course, greatly enhanced when it appears, as it does here, that prior to the issuance of the patents, the identical title was adjudicated, especially when the case was carried to the highest court in the land. Such

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[1] *United States v. Maxwell Land-Grant Co.* (1887) 121 U. S. 325, 381; *United States v. Stinson* (1905) 197 U. S. 200, 204.

adjudication, long acquiesced in as it was in this instance, becomes a rule of property—a rule of the particular title—from which the courts are not free to depart.[1] The refusal of the court below to be guided by this principle gives rise to a question of the utmost importance, affecting, as it does, many land titles.

From early days this Court has recognized and frequently applied the general principle of *stare decisis* in cases involving land titles. In a comparatively recent case this Court held that the rule must be applied, even against the United States and even though the United States was suing on behalf of Indian wards of the government. In *United States v. Title Insurance & Trust Co.* (1924) 265 U. S. 472, the United States, as guardian for certain Mission Indians, sought to quiet title to a perpetual right of the Indians to occupy, use and enjoy lands which were part of a Mexican land grant that had theretofore been confirmed and patented to others by the United States. The Indians had not presented their claim to the Board of Land Commissioners for confirmation. Some twenty-three years earlier the Supreme Court had decided that, in the absence of presentation of a claim for confirmation to the Board of Land Commissioners, the Indians had no

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[1]To avoid any misunderstanding of our position, it should be said that we recognize that the *Irwin* decision, although rendered in a litigation against an officer of the government, is not *res judicata* as to the United States in view of such decisions as *Carr v. United States* (1879) 98 U. S. 433, and *United States v. Lee* (1882) 106 U. S. 196. Those cases, however, do not involve the principle upon which we rely here—which is that after an adjudication of the identical title has been allowed to stand for many years, so that those dealing with the title have purchased and made their improvements in reliance upon the adjudication, the courts will, in later litigation, adhere to the earlier decision.

right of possession, use or occupancy.[1] In the subsequent case it was contended, just as the United States contends here and as in effect the majority of the Circuit Court of Appeals have held, that the earlier decision was wrong and should be departed from. In rejecting this contention and in holding and emphasizing the importance of adhering to the earlier decision this Court said:

> "The question whether that decision shall be followed here or overruled admits of but one answer. The decision was given twenty-three years ago, and affected many tracts of land in California, particularly in the southern part of the state. In the meantime there has been a continuous growth and development in that section, land values have enhanced, and there have been many transfers. Naturally there has been reliance on the decision. The defendants in this case purchased fifteen years after it was made. It has become a rule of property, and to disturb it now would be fraught with many injurious results. Besides the goverment and the scattered Mission Indians have adjusted their situation to it in several instances. As long ago as Minnesota Min. Co. v. National Min. Co., 3 Wall. 332, 18 L.ed. 42, this court said (p. 334): 'Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are

[1] *Barker v. Harvey* (1901) 181 U. S. 481.

> retrospective, and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change.' "

This rule has particular, and we might add peculiar, application where, in the subsequent litigation, the identical title is again involved. As many courts of last resort have held, it would be intolerable if the same title, after having been adjudicated by a highest court and the adjudication's having stood for many years, were to be open to re-adjudication. As this Court pertinently observed in the quotation given above,

> " 'Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open'." (265 U. S. 486)

To illustrate this principle as applied to cases involving the identical title, it suffices to refer to a few cases which, in their essential aspects, approach the facts of the case at bar. In *Ingoldsby v. Juan* (1859) 12 Cal. 564, the California Supreme Court adjudicated the title to certain lands, the title to which turned upon the validity of a deed made by Donna Martina Castro to her children. Some years later, in the case of *Hihn v. Courtis* (1866) 31 Cal. 398, an attempt was made to relitigate the validity of this same deed as it affected the title to the same land, just as here the United States seeks to re-adjudicate the scope and effect of the confirmation decree. There, as here, the contention was that the previous decision was wrong and

should not be followed. The court, in an opinion[1] which we commend to this Court, held that although the principle of *res judicata* did not apply, the matter was no longer open to reconsideration, saying (p. 402):

> "That decision has become a rule of property with reference to this land, and many parties may have purchased portions of it during the last eight years on the faith of the adjudication. Certain it is, from the number of parties to this and the other suit referred to, decided at this term, that many persons are interested in the lands in controversy. To overturn the former adjudication under such circumstances, because a majority of the present court might arrive at a different conclusion from that attained by their predecessors—men equally well qualified to discern, and equally conscientious in the pursuit of the right, would be to trifle with the rights of litigants and bring merited obloquy upon the administration of justice.
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> "There was an adjudication on the identical deed—the identical title—eight years ago, and important rights may, and probably have, been acquired on the faith of that adjudication. If after a lapse of so long a term this adjudication could now be properly disturbed, in the language of Mr. Fearne, before cited, 'Even a decision of a court of justice upon the very identical title would be nothing more than a precarious temporary security.' It could, in fact, hardly be called a 'temporary security.' For these reasons we

[1] It is interesting to note that the opinion was written by Associate Justice Lorenzo Sawyer who later, as United States Circuit Judge, participated with Mr. Justice Field in the decision of the *Irwin* case. Moreover, the decision was concurred in by Associate Justice Rhodes, who was appointed special counsel for the Government in the *Irwin* case.

decline to re-examine the grounds of the decision in *Ingoldsby v. Juan,* and without intimating any opinion as to the correctness or incorrectness of the conclusions attained, adhere to it in this case on the principles of *stare decisis.*"

A very illuminating application of the rule is afforded by two decisions of the Supreme Court of Michigan. In *Winans v. Willetts* (1917) 197 Mich. 512, the rights of the parties turned upon the question whether Winans Lake was in point of fact navigable or non-navigable, just as this case turns upon whether the lands were a part of Mare Island and within the confirmed Castro grant. The Supreme Court of Michigan held that the lake was non-navigable. Some nine years later the identical question arose in *Pleasant Lake Hills Corporation v. Eppinger* (1926) 235 Mich. 174. It there appeared that the corporation, relying upon the former adjudication, had acquired the Winans lands and had expended some $170,000 in improvements. The defendants sought to relitigate the question of title to the lake. Mr. Justice Fellows, who dissented in the earlier case, wrote the opinion of the court and squarely ruled that the title could not be re-adjudicated. He said:

"The writer of this opinion did not then agree with the opinion of the court in that case and wrote in dissent. But it is unimportant what his views then were or now are. We think it is likewise unimportant what views any or all the members of the court as now constituted entertain. Every reason for the application of the doctrine of stare decisis demands that this court accept the holding of the court in that

case as final. The property involved is the same. The rights asserted are the same. In reliance upon the decision in that case, plaintiff has invested $170,000. Every element of fair dealing with litigants requires us to recognize the doctrine of stare decisis, and as applied to the same property follow the decision in that case. If it is to be ever overruled, it should be in a case involving other property than that specifically passed upon there."

The same principle was applied by the Supreme Court of Michigan in *St. Helen Shooting Club v. Carter* (1929) 248 Mich. 376, where the Court followed its earlier decision in *St. Helen Shooting Club v. Mogle* (1926) 234 Mich. 60.

The Supreme Court of Tennessee has very forcefully announced the same principle. In *Burr v. White Oak Lumber Co.* (1924) 149 Tenn. 191, the question of title turned in part upon the validity of a tax deed, which the trial court held to be valid. It appeared, however, that some 27 years previously the Supreme Court of Tennessee, in the case of *Darrow v. Wright,* held the identical tax deed to be void, just as in the *Irwin* case it was decided that the confirmation decree did not cover the lands here in suit. The Supreme Court of Tennessee held the failure to follow the earlier decision was error, saying:

"We are of the opinion, however, that the validity of this tax sale is not an open question in Tennessee.

* * *

"A title previously passed upon, although in a suit between different parties, ought not to be again con-

troverted and examined in a case presenting the same question upon the same facts.

* * *

"So we think that the decision in Darrow v. Wright established a rule of property as to the land covered by the tax deed from B. Lee to Freddie Matson. This decision became the law of the Matson title, and we are not willing to disturb it after 27 years.

"Although there was no written opinion in Darrow v. Wright, the decree was none the less effective to declare the law of that title. It was necessarily relied on by everyone who examined the title to any portion of this land and purchased any portion thereof."

In the case of *Fisher v. Lott* (1908) 33 Ky. L. 609, the question of title turned upon the provisions of a will. Some 43 years previously the same will had been before the court. It was contended that the former adjudication was wrong and should not be followed. The Court of Appeals of Kentucky held, however, that the question was not open to re-examination, saying:

"Whatever doubt we may have had concerning the construction placed upon this clause of the will is resolved in favor of that consistency which ought to prevail in the opinions of the court concerning identical matters, particularly where the title to real estate is involved, and upon the faith of which previous opinion the public may have been led into a sense of security in trafficking in these titles, relying upon the presumption that, when once authoritatively construed by the court of last resort of the state, that construction is conclusive."

We forbear further citation. The rule, as well as the reason for it, must be plain.

The title to the lands now in controversy was adjudicated in the *Irwin* case against the identical claims that are now made by the government that those lands were a part of Mare Island and were within the Castro grant and were confirmed by the decree of the Board of Land Commissioners. All of these claims were met and answered by Mr. Justice Field, then sitting in circuit. The case was carried to the Supreme Court of the United States by counsel for the government, where the judgment was affirmed. It was following that judgment that the lands were acquired by Dr. Cross and thousands upon thousands of dollars were spent in their reclamation and improvement. The case here is much stronger than the usual one for the application of the rule, in that the government's own law officers conducted the litigation and carried it to this Court. Since that time all of the officers of the government having authority to deal with the land have regarded that decision as conclusive,—as, we submit, propriety required they should. The land was patented to the State of California, in the name of the President of the United States himself, upon the strength of that decision. And all of the present owners bought their lands and erected their improvements after the patents had issued. If ever there was a case calling for the application of the doctrine of *stare decisis* surely this is it.

The principal majority opinion suggests (R. V—164) —as apparently affording a ground for departing from

this decision of 40 years' standing—that more exhaustive investigations have disclosed facts which were not before the court in that case and, adopting the thought, the government makes the same point in its brief opposing certiorari (Govt's. Br. p. 12). It is first to be noted that were this true, it would afford no ground for departing now from the *Irwin* decision. The quotations from the authorities we have reviewed above make it clear that possible error in an earlier adjudication affecting land titles is no ground for not following that adjudication in later litigation. Indeed, the whole purpose of the rule is to protect those who rely upon a final adjudication by a court of last resort against a later departure because of possible error. Otherwise, there would be no occasion for a rule of *stare decisis* at all.

It is next to be noted—and we speak with deference—that there is nothing to support the statement that more exhaustive investigations have disclosed that "the true facts were not before the court" in the *Irwin* case. Nor are the implications of the further statement

> "that the facts respecting tidal conditions obtaining on the island were at least within the possibility of knowledge on the part of claimants willing to take note of those conditions or desirous of investigating the available evidence" (R. V—164)

warranted. The implications of these observations by the court below, to state them bluntly, (first) that petitioners and their predecessors were either negligent in failing to make adequate investigations or were deliberately unwilling to go into the facts, and (second) that had they shown

due diligence they would have discovered that the facts upon which the *Irwin* case was decided were erroneous and that the *Irwin* decision could not be relied upon. With due respect to the court below, we urge that these suggestions are wholly without justification.

In the case at bar the facts have been exhaustively investigated, both by the government and by petitioners. Certainly those investigations meet the most exacting tests of diligence suggested by the court below. Those investigations revealed the facts shown by the record here. And, far from disclosing that the true facts were not before the court in the *Irwin* case, those investigations confirm that the *Irwin* case was correctly decided upon the facts as they actually existed.

To be specific,—the critical point, as indicated by the decision below, is as to whether the tule lands to the northwest of the high and dry land of Mare Island were above ordinary high-water mark. The record here affirmatively shows that on that question Mr. Justice Field had before him an accurate survey made by the United States Coast and Geodetic Survey showing, as do all maps pretending to any accuracy, that from the high and dry land north, including the so-called isthmus or "neck", all of the lands were, just as we have admitted them to be, above ordinary high-water mark. Petitioners' Exhibit 17 in this case (R. II—658, IV—49) is actually a photostatic reproduction of defendants' Exhibit U in the *Irwin* case, as the notation appearing in the upper right-hand corner of the map shows. And, as appears upon its face, the map

was specially prepared for the United States Attorney for use in the *Irwin* litigation, obviously to show the very fact that these lands were above ordinary high-water mark. Moreover, Swamp Land Survey 569 must have been before the court in the *Irwin* case and that survey likewise shows (R. II—648, IV—37) all of the tule lands northwest of "Mare Island" to be above the line of mean high-water. The most exhaustive investigations show, therefore, that Mr. Justice Field had the true facts before him when he decided the *Irwin* case.

Nor can the *Irwin* case be explained away upon the ground, which the opinion below implies and as the government has expressly argued in its brief opposing certiorari (Govt's. Br. p. 12), that Mr. Justice Field based his decision that the lands in Swamp Land Survey 569 had passed to the State under the Swamp Land Act upon the erroneous assumption that those lands were below ordinary high-water mark. Had those lands been below ordinary high-water mark they would of course have been tide-lands and, as such, would have passed to the State, not under the Swamp Land Act, but by virtue of its sovereignty. *Pollard v. Hagan* (1845) 3 How. (44 U. S.) 212. This rule as to tide-lands was familiar law to Mr. Justice Field who, as Chief Justice of California, wrote the opinion in *Teschemacher v. Thompson* (1861) 18 Cal. 11 dealing with the precise question of the State's ownership of tide-lands and who, as Associate Justice of the United States Supreme Court, wrote this Court's opinion in *Weber v. Board of State Harbor Commissioners* (1873) 85 U. S. 57, in which it was held that upon the admis-

sion of California into the Union absolute property in and dominion over all lands under the tide-waters within its limits passed to the State by virtue of its sovereignty.[1] That he had this precise rule in mind in the *Irwin* case appears from his statement that "The shore, which belongs to the public, is the line between that mark"—ordinary high-water mark—"and low-water mark, over which the daily tides ebb and flow" and that under neither the common law nor the civil law "could the private ownership of the land of the island extend to lands regularly covered each month by the flow of the tides." (28 Fed. 713) It is plain, therefore, that Mr. Justice Field did not, and in view of his knowledge of the law could not have based his decision in the *Irwin* case upon the erroneous assumption that the lands here in suit were below mean or ordinary high-water mark.

Nor is it true as intimated in the majority opinion below (R. V—165) and as argued in the government's brief opposing certiorari (Govt's. Br. p. 17) that the rights of those claiming under the State have from the beginning been shrouded in doubt and uncertainty and, absent an adjudication of title to which the government was a party, those claiming under the State were not entitled to rely upon the government's own solemn patents. As to the matter of doubt and uncertainty, while it is true that prior to this Court's decision in the *Irwin* case, the question of title was in doubt, from the time of that decision in 1890

[1]This same result was reached in the case of *Mumford v. Wardwell* (1867) 6 Wall. (73 U. S.) 423, 436, in which Mr. Justice Field participated.

down to the filing of this suit by the government there was no doubt or uncertainty whatever. As we have said and as the record shows beyond any possibility of dispute, private parties and government officers alike have—as we respectfully assert they should have—regarded that decision as final. The record is barren of any dissent from or question of it.[1]

As to the suggestion that, absent an adjudication of title to which the government was a party, petitioners and their predecessors were not entitled to rely upon the patents,—surely it cannot be the law that after this Court has passed upon and adjudicated a particular land title, those dealing with that identical title are to regard the matters thus adjudicated as being still unsettled.[2] Nor should it be the rule, as the opinion below implies, that official patents of the United States are nothing more than precarious quit-claims, conveying only a speculative title. On the contrary, where, as in this case, patents have issued after a decision of this Court that title has passed from the government, those patents should be deemed conclusive.

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[1]None of the cases cited in the government's brief opposing certiorari (p. 17), with the sole exception of the *Irwin* case itself, had anything to do with the lands involved in this case—all of them dealt with Mare Island proper or with the swamp lands in Survey 34. Those cases do show that the government's claim of title under the Castro Grant, even as to those other lands, was in doubt, as justly it should have been after it successfully repudiated that grant and caused it to be held to be a forgery in *Bouldin v. Phelps* (1887) 30 Fed. 547. There is nothing whatever in any of those cases to show that there was any doubt as to the title to the lands in Survey 569 after this Court decided the *Irwin* case. The statement to the contrary is wholly without support.

[2]It scarcely need be added that private persons, dealing with land titles, have no way of obtaining an adjudication to which the government is a party, inasmuch as the United States cannot be sued without its consent.

Otherwise, purchasers have no protection whatever in dealing with titles emanating from the government.

Under the rule of *stare decisis* the *Irwin* decision should now be followed. That rule has for its underlying principle those considerations of equity and justice which urgently call for application here.

II.

THE ACTION IS CLEARLY BARRED BY THE FEDERAL STATUTE OF LIMITATIONS AS TO THE PATENTS WHICH WERE 34 AND 20 YEARS OLD WHEN SUIT WAS BROUGHT.

After the decision of this Court in the *Irwin* case the government issued patents to the State of California covering all of the lands involved in this suit. Swamp land patent 72 was issued in 1896, 34 years before this action was brought, and swamp land patent 152 was issued in 1910, 20 years before. As to those two patents the action is plainly barred by the federal six-year statute of limitations, Act of Congress March 3, 1891, §8 (26 Stats. 1095, 1099, U. S. C., Title 43, §1166), which provides:

> "Suits by the United States to vacate and annul any patent shall only be brought within six years after the date of the issuance of such patents."

The case is, of course, within the exact language of this statute. The government has claimed, however, and a majority of the court below have held, that the statute does not apply where the Land Department did not have jurisdiction to issue the patent and, so it is said, there was

no jurisdiction here because the lands were within the confirmed Castro grant. Aside from the fact that that question has, as we have seen, been concluded by the *Irwin* litigation and, as we shall later see, the evidence conclusively shows that these lands were not within the confirmation decree, this Court has held that a claim of want of jurisdiction in the Land Department affords no defense or exception to the statute. This point was directly ruled upon in the leading case of *United States v. Chandler-Dunbar Water Power Co.* (1908) 209 U. S. 447, in an unanimous opinion written by Mr. Justice Holmes.

In the *Chandler-Dunbar* case the patent under attack purported to be issued upon a scrip location. After the patent had issued the government claimed, just as it does here, that the patent was absolutely void because the Land Department had no jurisdiction, the land having been reserved at the time of patent. It is obvious that if the land was in fact reserved at the time of patent, as the government claimed, it was just as much beyond the jurisdiction of the Land Department as would be the case of land embraced within a confirmed Mexican grant. This Court declined to pass upon the question whether the land was in fact reserved, holding that, assuming it was, none the less the patent was protected by the statute and should be held to be good. The ruling upon this point is contained in two paragraphs of the opinion and is so important that we quote:

> "There is force in the contention of the United States that the land was reserved and that it had not been surveyed, but we find it unnecessary to state or pass upon the arguments, because we are of opinion

that now the patent must be assumed to be good. The statute just referred to provides that 'suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act.'—that is to say, from March 3, 1891. This land, whether reserved or not, was public land of the United States, and in kind open to sale and conveyance through the Land Department. United States v. Winona & St. P. R. Co., 165 U. S. 463, 476, 41 L.ed. 789, 795, 17 Sup. Ct. Rep. 368. *The patent had been issued in 1883 by the President in due form and in the regular way. Whether or not he had authority to make it, the United States had power to make it or to validate it when made, since the interest of the United States was the only one concerned. We can see no reason for doubting that the statute, which is the voice of the United States, had that effect.* It is said that the instrument was void and hence was no patent. But the statute presupposes an instrument that might be declared void. When it refers to 'any patent heretofore issued', it describes the purport, and source of the document, not its legal effect. If the act were confined to valid patents it would be almost or quite without use. Leffingwell v. Warren, 2 Black, 599, 17 L.ed. 261.

"In form the statute only bars suits to annul the patent. But statutes of limitation, with regard to land, at least, which cannot escape from the jurisdiction, generally are held to affect the right, even if in terms only directed against the remedy. Leffingwell v. Warren, 2 Black, 599, 605, 17 L.ed. 261, 263; Sharon v. Tucker, 144 U. S. 533, 36 L.ed. 532, 12 Sup. Ct. Rep. 720; Davis v. Mills, 194 U. S. 451, 457, 48 L.ed. 1067, 1071, 24 Sup. Ct. Rep. 692. *This statute*

> *must be taken to mean that the patent is to be held good, and is to have the same effect against the United States that it would have had if it had been valid in the first place.* See United States v. Winona & St. P. R. Co., 165 U. S. 463, 476, 41 L.ed. 789, 795, 17 Sup. Ct. Rep. 368."

The majority below have sought to read into the statute an exception that finds no warrant either in the language of the statute itself or in the decisions of the courts. Specifically, the majority have said:

> "It is settled that the 1891 act has reference only to patents issued for lands open to disposition through the general land office. It is 'strictly a part of the public land laws.'" (R. V—161)

With deference to the court below, we respectfully submit that this statement is not correct. It is not only not "settled" that the act has reference only to patents for lands open to disposition by the General Land Office, but in our view this Court has expressly settled the rule to be otherwise. In *United States v. Coronado Beach Co.* (1921) 255 U. S. 472, 488, this Court held the act applicable to patents issued in confirmation of Mexican land grants in California and certainly Mexican land grant lands are not, as the court below phrases it, "open to disposition through the general land office". Nor does the *Coronado Beach* case stand alone,—it has repeatedly been followed by the lower federal courts, where certiorari has been denied. See *Hogan v. United States* (C.C.A. 9th Circ. 1934) 72 F. (2d) 799, 806-807, cert. den. 295 U. S. 752; *Putnam v. Ickes* (C.A.D.C. 1935) 78 F. (2d) 223, 227-228, cert. den. 296 U. S. 612.

Moreover, we respectfully submit that the court below has misapplied the phrase "strictly a part of the public land laws" which it quotes from *United States v. Minnesota* (1926) 270 U. S. 181, 196. Had the full sentence from which this phrase was taken been quoted the import of the decision would have been plain. What this Court there said was:

> "The provision in the Act of 1891 has been construed and adjudged in prior decisions—which we see no reason to disturb—to be strictly a part of the public land laws and without application to suits by the United States to annul patents, as here, because *issued in alleged violation of rights of its Indian wards and of its obligations to them. Cramer v. United States, supra,* p. 233; *La Roque v. United States,* 239 U. S. 62, 68; *Northern Pacific Ry. Co. v. United States,* 227 U. S. 355, 369."

The portion of the quotation which we have italicized indicates what the true holding was and lends emphasis to the language of the *Chandler-Dunbar* case quoted at pages 33-35, *supra.* The true rule is this: where the interests of the United States alone are concerned the statute applies—where interests of others are involved those interests are not subject to the bar against the government.[1] Neither the court below nor the government

[1] This is evident from the language of *Cramer v. United States* (1923) 261 U. S. 219, cited by the Court in the quotation above, where this Court said (at page 233):

> "The object of the statute is to extinguish any right the *government** may have in the land which is the subject of the patent, *not to foreclose the claims of third parties.* * * * After the lapse of the statutory period, the patent becomes conclusive *against the government,* but not against the claims and rights of others, * * *."

*Emphasis not ours, but the Court's.

has cited nor have we found a case where, the interests of the United States alone being involved, this Court has held the statute not to apply. The statute plainly covers cases such as this and, as pointed out by the Court in the *Chandler-Dunbar* case, should be given effect accordingly.

The court below (R. V—162) and the government in its brief in opposition to the granting of certiorari here (Govt's. Br. p. 15) seek to distinguish the *Chandler-Dunbar* case by saying that in that case there was a statute authorizing the Land Department to dispose of the particular lands there involved, whereas here there was not. This attempted distinction is unsound, because the supposed premise upon which it is based lacks foundation in fact. In the *Chandler-Dunbar* case, as well as in this one, the Land Department was, if the claim of the government were to be accepted, completely without jurisdiction to issue the patent,—in the former case because the lands were reserved, in the latter because the lands were within a Mexican land grant and therefore not included in the Swamp Land Grant. Obviously, if, as claimed by the government in the *Chandler-Dunbar* case, the lands were in fact reserved, there was no statute authorizing their disposition by the Land Department. To avoid this dilemma the government says, however, that, but for the reservation—i. e., except for complete want of jurisdiction—the lands were of a kind that the Land Department was authorized to dispose of. To which we rejoin that, if such reasoning is to be followed, it may equally be said in the case at bar that except for the fact (were it the fact) that the lands were embraced within a Mexican land grant,—i. e., again, except for the fact

making for want of jurisdiction,—the lands were precisely of the kind described in the Swamp Land Act and therefore were patentable by the Land Department.

The *Chandler-Dunbar* case is clear authority that though the Land Department may not have jurisdiction, if the interests of the United States *alone* are concerned the statute of limitations constitutes congressional authority for a patent which has been issued and outstanding for the statutory period. Such patents are, as this Court said, "to be held good". In this case the interests of the United States alone were involved—it is not even suggested that there are any outstanding interests, aside from those of petitioners—and therefore, in the language of Mr. Justice Holmes—"The United States had the power to make it (the patents) or to validate it (them) when made" and "the statute, which is the voice of the United States, had that effect."

Not only is the case at bar squarely within the principle and authority of the *Chandler-Dunbar* case, but to an unusual degree it presents a case within the mischief aimed at by the statute. Here the Land Department had the problem of determining the limits of the Castro Grant—because all of the swamp land outside of the Castro Grant was within the Swamp Land Act and patentable to the State. To guide it in its determination the Land Department had a decision of the United States Circuit Court for California, affirmed by this Court, that these identical lands in fact lay outside of the Castro Grant and had passed to the State under the Swamp Land Act. To make assurance doubly sure the Land De-

partment had the word of the Navy Department that it no longer claimed the lands. (Exs. 27 to 29, R. II—693-698, III—232-238, IV—50) Surely, under such circumstances it is not extending the plain intent of the statute—much less its express language—to hold that after the statutory period not only has run, but has run several times over, bona fide purchasers, such as petitioners, are to be protected.

The seriousness of the consequences of the ruling of the majority below is apparent. There must be literally hundreds of thousands of land titles founded upon swamp land patents. If the holding below be correct, no title under the Swamp Land Act is protected by the statute of limitations. No such title is secure from attack by the United States, no matter how belated. It may appropriately be asked—Is there any reason of public policy requiring that the statute be emasculated by reading into it an exception such as that suggested by the majority below? Clearly not. Every consideration of policy underlying statutes of repose applies to swamp land patents. This Court pointed out in *Wright v. Roseberry* (1887) 121 U. S. 488, 496, that in California alone nearly 2,000,000 acres passed to the State under the Swamp Land Act. It would be intolerable if, after patents had issued for these lands and purchases had been made in reliance upon them, just as occurred in this case, the resulting titles could be upset no matter how great a time had elapsed since the patents had issued.

By the *Chandler-Dunbar* decision the statute has been definitively construed to cover just such a situation as this

case presents. The statute itself contains no such exception as that sought to be read into it by the Circuit Court of Appeals. There is no decision of this Court supporting such an exception. As a matter of policy no such exception is required or warranted.

It is submitted that this action is clearly barred by limitations as to swamp land patents 72 and 152 and that the Circuit Court of Appeals erred in not so holding.

III.

THE COURT BELOW ERRED IN HOLDING THAT WHEN THE UNITED STATES COMES INTO A COURT OF EQUITY SEEKING AFFIRMATIVE EQUITABLE RELIEF IT IS NOT SUBJECT TO THE ORDINARY PRINCIPLE THAT A COURT OF EQUITY WILL NOT DO INEQUITY.

The outstanding feature of the decision of the majority below is the grave injustice of the result that has been reached. The decision in this respect is conspicuous. That the result is unjust is not merely our characterization of it; the majority who pronounced the judgment have themselves expressly recognized this fact. The principal majority opinion asserts that assuming the existence of the equities contended for by petitioners, the matter is beyond the sphere of judicial authority and relief must be had by way of legislative action. (R. V—166) The Circuit Judge who concurred did so, as he frankly said, "despite the grossly inequitable result," adding that "It is peculiarly a case for Congressional remedial action, beyond the equitable powers of this court." (R. V—166) We have, therefore,

the unusual spectacle of a decree of a court of equity which is confessed by those who made it to be most inequitable and unjust. We respectfully submit that in holding that the United States may have affirmative equitable relief notwithstanding the gross injustice of its claim, the majority have departed from the uniform rule of decision and from the usual and accepted principles of equity.

The facts show the entire lack of equity in the government's case.

As early as the late '60s application was made to the State for the purchase of the lands in controversy here as swamp and overflowed lands and in 1874 they were patented to petitioners' predecessor. (Ex. 5, R. II—651, III—185) Soon a controversy developed between the private land owners and the Commandant of the Mare Island Navy Yard and in 1883 the *Irwin* suit was started, in which petitioners' predecessors alleged their ownership of the swamp lands in Survey 569 and their exclusion therefrom by Irwin, who was the Commandant. (R. III —287-290) The government's claim of title (R. III—305-310) was set up by the government's own attorneys (Ex. 20, R. I—177, II—667, III—203) and was adjudged adversely to the claim now made by the United States. While this litigation was proceeding, the government was also litigating in another suit against the Commandant of the Navy Yard a claim by one Bouldin and others to the lands embraced in the Castro Grant under a chain of title out of Castro prior to the government's. The government's attorneys successfully met the issue in that case by proving that in point of fact the Castro Grant was void

as a forgery. *Bouldin v. Phelps* (1887) 30 Fed. 547.[1] In 1890 this Court handed down its decision in the *Irwin* case, affirming that title to the lands here in controversy was not in the United States, but had passed to the State under the Swamp Land Act.

We have then, by 1890, an adjudication of this identical title by this Court. We also have the fact that the government's attorneys had proved in court that the Castro Grant was fraudulent and void.

With the matter of the title to these lands thus seemingly finally settled, actual reclamation and use of the land by the private owners proceeded, with full knowledge and acquiescence by the government and appropriate affirmative action upon its part. The facts have been stated in some detail at pages 8-11, *supra*. Suffice it to say here that Dr. Cross bought Island No. 1 in 1895 and leveed it and reclaimed it at great expense. The lands were consistently taxed to their private owners from 1882 on. (R. II—645) They were sectionized and platted and then patented by the United States. As the years went on the lands changed hands and finally came into the ownership of your petitioners. Every one of them, without exception, bought after patents had been issued by the United States, in reliance on the *Irwin* decision of many years before. Petitioners themselves have expended in excess of $300,000

[1] It is interesting to compare the defense put up by the government's attorneys before the Board of Land Commissioners, where they had no interest to defeat the Castro Grant, with the defense they put up in the *Bouldin* case, when the title was really at stake. The *Bouldin* decision shows plainly enough the results of a real effort to test out the validity of the grant.

in the acquisition and improvement of the lands, exclusive of any moneys spent by their predecessors.

The action of the Land Department was consistent with that of the Navy Department, which in view of the *Irwin* decision made no claim to these lands. (Ex. 37, R. II—707, III—260-265) Ever since 1914 the Navy Department has maintained the present navy yard fence, which excludes all of the lands in controversy here. (R. II—188) Indeed, in 1913 the Commandant of the Yard filed in the office of the County Recorder of Solano County an official map of the lands embraced within the Navy Yard Reservation, in accordance with the act of the California legislature ceding jurisdiction of lands occupied by the United States for military purposes or defense (Cal. Stats. 1895, p. 51) and, again, this map covered none of the lands involved in this litigation. (Ex. 9, R. II—652-653, IV—38)

Notwithstanding all this, the government contends that the United States is now free to come into a court of equity and, without offering to do equity or make restitution, repudiate all that has gone on before, including its own patents which were freely issued, and take from petitioners the lands which they and their predecessors have so long held and, at such great expense, made valuable. Manifestly, no private person could prevail in a court of equity upon a claim so barren of equity or justice. No private person could move a court of equity to exercise its extraordinary powers to bring about such a wanton result.

The decision of the majority below poses this important question—When the United States comes into a court of

equity seeking equitable relief, is it entitled to a preferred status, so that it may have affirmative relief regardless of its inequity? May the United States, unlike any private litigant, have relief that is plainly unjust? Upon this point there should be but one answer and we think that it is afforded by all of the cases.

The case we have here is not one, as suggested in the concurring opinion below (R. V—166), of mere laches or non-action upon the part of the government. We have far more than mere delay, as the facts heretofore cited show. We have a definitive decision as to this identical title by this Court. We have the repeated affirmative action of the Land Department, conforming with that decision. We have the repeated affirmative action of the Navy Department, likewise conforming with that decision. This affirmative action has been relied upon, as necessarily it would be, by everyone dealing with the title to these lands.

The decision of the majority below not only reaches an over-all result that is essentially grossly unjust, but we have here the phenomenon of a court of equity figuratively throwing up its hands and declaring that it is without power to stay its own action in perpetrating this injustice. So far as we are aware, the decision below stands alone as a declaration by a court of equity of its inability to do equity. The decisions are numerous and practically in accord upon the proposition that when the United States comes into equity seeking affirmative relief it does so upon the same footing as other litigants (except as to laches and limitations) and that even at the instance of the United

States a court of equity will not decree that which is plainly inequitable and unjust.

In *Brent v. Bank of Washington* (1836) 10 Peters (35 U. S.) 596, this Court, in a suit in equity, declined to decree a transfer of stock in defendant bank held by the estate of a deceased paymaster to satisfy the government's statutory priority, where, under the bank's charter, the bank had the right to be paid the indebtedness due it before transfer of the stock, the holding being:

> "Thus compelled to come into equity for a remedy to enforce a legal right, the United States must come as other suitors, seeking in the administration of the law of equity, relief; to give which, courts of law are wholly incompetent, on account of the legal bar interposed by the bank. This court, in The United States v. Mitchell, 9 Peters, 743, have recognized the principle in the common law that though the law gives the king a better or more convenient remedy, he has no better right in court than the subject through whom the property claimed comes to his hands. 2 Co. Inst. 573; 2 Ves. Sen. 296, 297; Hard. 60, 460. This principle is also carried into all the statutes, by which the appropriate courts are authorized to decide, and under which they do decide on the rights of a subject in a controversy with the king, according to equity and good conscience between subject and subject." (35 U. S. 614)

In *United States v. Detroit Timber & Lumber Co.* (1906) 200 U. S. 321, in denying the government relief where it sought to set aside land patents as against a bona fide purchaser, this Court said:

"It is a mistake to suppose that for the determination of equities and equitable rights we must look only to the statutes of Congress. The principles of equity exist independently of, and anterior to, all congressional legislation, and the statutes are either annunciations of those principles or limitations upon their application in particular cases. In passing upon transactions between the government and its vendees we must bear in mind the general principles of equity, and determine rights upon those principles, except as they are limited by special statutory provisions." (200 U. S. 339)

In *American Propeller etc. Co. v. United States* (1937) 300 U. S. 475, this Court, in rejecting the government's contention that it was entitled to interest upon a counterclaim, said:

"We have said (*United States v. The Thekla*, 266 U. S. 328, 339-340, 341)—'When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it * * * the reasons are strong for not obstructing the application of natural justice against the government by technical formulas when justice can be done without endangering any public interest.' If the principle thus stated is not strictly applicable, it at least suggests that the court should not affirm what is clearly an unjust and inequitable result unless under plain compulsion of law." (300 U. S. 478)

Surely it is not holding the government up to too high a standard to require that, in suits brought by it against its

own citizens, it shall be held to have agreed "that justice may be done with regard to the subject matter".

The expressions of the Court which we have quoted are not mere occasional sporadic statements of an exception to the general rule, but indicate a consistent course of decision, enunciating what is the usual and accepted principle. They find their counterpart in numerous decisions of the lower federal courts. A few citations will suffice to illustrate.

In *United States v. National City Bank* (C. C. A. 2nd Circ. 1936) 83 F. (2d) 236, certiorari denied 299 U. S. 563, it was held that the United States, seeking in equity to recover a bank deposit as assignee of the Russian government, is subject, like any other litigant would be, to a claim of set-off, the court saying:

> "The United States suing, having no more rights than its assignor, is subject to that set-off. When a sovereign sues, it may not expect a preferred status, for its suit is determined according to the rules applicable to private suitors in like cases." (83 F. (2d) 239)

In *United States v. Devereux* (C. C. A. 4th Circ. 1898) 90 Fed. 182, it was held that after long delay the United States could not enforce a trust deed given to secure certain judgments, where the property had come into the hands of innocent purchasers, the court saying:

> "It was suggested in argument that as the United States in this case comes into court claiming rights as cestui que trust under a deed between private parties, and asserting these rights as a private individual would, the case does not involve any governmental right or duty; that, therefore, the ordinary

rules controlling courts of equity as to laches should be enforced. This position cannot be maintained. The United States do not and cannot hold property as a monarch may for private or personal purposes. Van Brocklin v. Tennessee, 117 U. S., at page 158, 6 Sup. Ct. 670. In the present case the United States holds what title it has to the property in question as it holds all other property for public and private purposes (U. S. v. Insley, 130 U. S. 265, 9 Sup. Ct. 485); and cannot be prejudiced by the negligence of the officers and agents to whose care their interests were confided; nor are they bound by any statute of limitations (U. S. v. Railway Co., 118 U. S. 120, 6 Sup. Ct. 1006).

"With this exception, however, and in perfect consistency with it, when a sovereign comes into one of its own courts of its own accord, and seeks relief, all the rules established for the administration of justice between individuals are applied and bind all parties." (90 Fed. 186)

In *Mountain Copper Co. v. United States* (C. C. A. 9th Circ. 1906) 142 Fed. 625 it was held that the United States would be denied injunctive relief against fumes of a copper smelter which had destroyed timber and vegetation on public lands, where similar relief would be denied a private person, the court saying:

"It is the well-established law that, when the government comes into a court asserting a property right it occupies the position of any and every other suitor. Its rights are precisely the same; no greater, no less." (142 Fed. 629)

In *The Falcon* (D. C. Md. 1927) 19 F. (2d) 1009 the government was denied relief against a tug which was

alleged to have been responsible for a collision because during the four years' delay in bringing suit, the tug had passed into hands of innocent purchasers against whom it would have been inequitable to grant relief. It was there said:

> "There is, indeed, an element of estoppel against the United States involved in the facts of the case at bar, by reason of its failure to act for a period of two years after the injury was suffered, and its seeming acquiescence in the sale of the tug. Estoppels against the public are perhaps not as readily granted as against private individuals, but it has been decided frequently that the public may estop itself by acts done in its proprietary capacity. While mere delay, either by limitations or laches, does not of itself constitute a bar to suits of the United States, yet when a sovereignty submits itself to the jurisdiction of a court of equity, and prays its aid, its claims and rights are adjudicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances." (19 F. (2d) 1014)

In *United States v. Flint* (C. C. Cal. 1876) 25 Federal Cases 1107, #15,121, the government was denied relief, upon equitable grounds, against a decree of confirmation alleged to have been obtained by fraud, the court saying:

> "The United States, by virtue of their sovereign character, may claim exemption from legal proceedings, but when they enter the courts of the country as a litigant they waive this exemption, and stand on the same footing with private individuals. * * * And, when they go into a court of equity, they must equally present a case by allegation and proof entitling them to equitable relief.

* * *

> "All the attendant circumstances of each case will be weighed, that no wrong be done to the citizen, though the government be the suitor against him." (25 Fed. Cas. p. 1113)

In *United States v. Dominion Oil Co.* (D.C. Cal. 1917) 241 Fed. 425, the government was denied a temporary injunction and receiver as to oil lands within a presidential withdrawal upon the ground that a private litigant could not have such relief, the court saying:

> "I conceive it to be clearly established, both upon reason and authority, that the government, in such a case as this, and even under circumstances so persuasively in its favor, possess no higher or different rights than a private individual seeking similar relief would possess. The fact that the securing or conserving of oil as a fuel for its navy, whereby it may properly defend or even perpetuate itself, is involved, does not add to its rights in this court nor change its character as a suitor. What it may do because of military necessity through its executive branch does not concern us here." (241 Fed. 427)

The court below has, we respectfully submit, erred in not giving effect to the rule of these cases. Its decision gives the government a status, as a party litigant in equity, to ask and receive relief that is grossly inequitable. That the government does not enjoy such a status and that it may not have relief that is against all conscience is attested by the cases cited.

Upon general principles of equity the court below should have denied the government the relief sought in this case.

IV.

THE COURT BELOW ERRED IN HOLDING THAT THE GOVERNMENT IS NOT SUBJECT TO EQUITABLE ESTOPPEL.

The facts previously reviewed (pp. 8-12, 41-43, *supra*) make out a clear case of equitable estoppel. As we read the principal opinion below (R. V—163-166), the essence of the holding is, not that the facts at bar are insufficient to establish a case of equitable estoppel, but that upon some supposed principle of public policy the sovereign is not subject to the defense. This holding is in direct conflict with the repeated decisions of the federal courts and, we respectfully submit, is not the law.

Undoubtedly the leading case in this country upon the subject of equitable estoppel as against the sovereign is the decision of the Eighth Circuit Court of Appeals in *Iowa v. Carr* (C. C. A. 8th Circ. 1911) 191 Fed. 257. The question there was whether the sovereign, the State of Iowa, was estopped to claim certain lands which, but for the element of estoppel, were owned by it as a portion of the bed of the Mississippi River uncovered as a result of a sudden avulsion. The facts making for an estoppel were much less extreme than those presented here. The court nevertheless held that the sovereign was estopped to set up its claim of title. The opinion contains such an excellent discussion of the whole subject and such an able review of the leading authorities that we quote the following for the convenience of the Court:

> "But the great weight of authority, the stronger reasons and the settled rule upon this subject in the courts of the United States, is that, while mere delay

does not, either by limitation or laches, of itself constitute a bar to suits and claims of a state or of the United States, yet, when a sovereignty submits itself to the jurisdiction of a court of equity and prays its aid, its claims and rights are judicable by every other principle and rule of equity applicable to the claims and rights of private parties under similar circumstances.

"The equitable claims of a state or of the United States appeal to the conscience of a chancellor with the same, but with no greater or less force than would those of an individual under like circumstances. United States v. Stinson, 197 U.S. 200, 204, 205, 25 Sup. Ct. 426, 49 L. Ed. 724; United States v. Detroit Timber & Lumber Co., 67 C.C.A. 1, 10, 131 Fed. 668, 677; United States v. Chicago, M. & St. P. Ry. Co. (C.C.) 172 Fed. 271, 276; United States v. Chandler-Dunbar Water Power Co., 152 Fed. 25, 26, 27, 37, 38, 40, 41, 81 C.C.A. 221, 222, 223, 233, 234, 236, 237; United States v. Stinson, 125 Fed. 907, 910, 60 C.C.A. 615, 616; Herman on Estoppel, §§676, 677; State of Michigan v. Jackson, L. & S. R. Co., 16 C.C.A. 345, 351, 69 Fed. 116; 122; State v. Flint & P. M. R. Co., 89 Mich. 481, 51 N.W. 103, 106; United States v. California & Oregon Land Co., 148 U.S. 31, 41, 13 Sup. Ct. 458, 37 L. Ed. 354; Carr v. United States, 98 U.S. 433, 438, 25 L. Ed. 209; United States v. Walker (C.C.) 139 Fed. 409, 411, 412, 413; United States v. Willamette Valley & C. M. Wagon Road Co. (C.C.) 55 Fed. 711, 717; Attorney General v. Central Railway Co., 68 N.J. Eq. 198, 59 Atl. 348. Thus a state is estopped from ousting a city organized under a void law after the city has been exercising its assumed powers for only four years, but has levied and collected taxes

and assessments, constructed bridges and streets, and made other improvements meanwhile without protest or objection on the part of the state. State v. City of Des Moines, 96 Iowa, 521, 532, 533, 65 N.W. 818, 31 L.R.A. 186, 59 Am. St. Rep. 381. And a state is estopped from ousting a private corporation for illegality in its organization after a delay of a few years while the corporation has been exercising, without objection on the part of the state, its assumed corporate powers, has been collecting and expending money and changing its financial relations to its stockholders and creditors in reliance upon the acquiescence of the state. Commonwealth v. Bala & Bryn Mawr Turnpike Co., 153 Pa. 47, 25 Atl. 1105; State of Wisconsin v. Janesville Water Power Co., 92 Wis. 496, 66 N.W. 512, 515, 32 L.R.A. 391; State v. Lincoln Street Ry. Co., 80 Neb. 333, 114 N.W. 422, 427, 14 L.R.A. (N.S.) 336; State v. School District No. 108, 85 Minn. 230, 88 N.W. 751; Attorney General v. Delaware & Bound Brook R.R. Co., 27 N.J. Eq. 1; 24; People v. Alturas County, 6 Idaho, 418, 55 Pac. 1067, 1068, 44 L.R.A. 122; Vermont v. Society for the Propagation of the Gospel, 2 Paine (C.C.) 545, Fed. Cas. No. 16,920. According to the decisions of the highest judicial tribunal of the state of Iowa a city may be estopped from claiming a street or an alley, or from maintaining the original lines thereof, by acquiescing in the possession, occupation and improvement of it, or of a part of it by a citizen who claims title thereto by possession and estoppel only. Corey v. City of Fort Dodge, 118 Iowa, 742, 749, 92 N.W. 704. The same court holds that a like estoppel may arise against a city by its taxation of the property when the claimant in possession pays the taxes. Smith v. City of

Osage, 80 Iowa, 84, 89, 45 N.W. 404, 8 L.R.A. 633; Dillon on Corporations, §533; Audubon County v. Emigrant Co., 40 Iowa, 460; Page County v. B. & M. R.R. Co., 40 Iowa, 520; Austin v. Bremer County, 44 Iowa, 155; Adams County v. B. & M. R.R. Co., 39 Iowa, 507.

* * * * * * *

"In State of Michigan v. Jackson, L. & S. R. Co., 16 C.C.A. 345, 346, 350, 351, 352, 69 Fed. 116, 117, 121, 122, 123, 50,000 acres of land were granted to the state as swamp lands by the act of Congress of September 28, 1850. But these lands were subsequently certified, and finally between 1869 and 1873 erroneously patented to a railroad company in supposed execution of a grant of the United States by the act of June 3, 1856, to the state to aid in the construction of railroads. Knowledge of the title of the state to these lands was, by the acts of Congress and the public records, equally open to all parties in interest. A railroad company to whom the lands were conveyed by the patentee built the railroad, in reliance upon the title evidenced by the patents, sold a part and still held a part of the land, when in 1887 the state of Michigan brought a suit in equity to remove the cloud of these patents and of the conveyances under them from its title to the land under the swamp land grant. The Court of Appeals of the Sixth Circuit dismissed the bill and said:

> "'The state cannot be permitted to say that it has slept during all this long period and abandoned its sovereign duties to its citizens, as well as its reciprocal moral obligations to the government, which has made it so magnificant a gift. The state is not to be regarded as a mere machine, incapable of intelligence or conscience. And, while it is neces-

sary and right to restrain or annul the unauthorized acts of its agents by which its interests might be impaired, yet there must come a time after long-continued acquiescence in public action with knowledge of it, when, in the interest of its citizens, the state itself shall be precluded from despoiling others by the assertion of its original rights.'

"To the same effect on a similar state of facts was the decision of the Supreme Court of Michigan in State v. Flint & P.M.R. Co., 89 Mich. 481, 51 N.W. 103, 106.

"In United States v. Walker (C.C.) 139 Fed. 409, 412, 413, 420, Walker was a United States marshal from 1889 to 1893. During this time he presented in his accounts charges for services rendered by his deputies which he and the accounting officers supposed to be lawful, but which were in fact illegal. The United States allowed and paid these charges from time to time during the four years he held his office, knowing that a large portion or all the amounts so paid to him would be immediately paid over by him to his deputies in payment of their services, as it was. Five years after his accounts had been allowed and closed and after the expiration of his term as marshal, the United States presented to the Circuit Court a claim for the repayment of these amounts by Walker, but the court refused to sustain the claim and said:

" 'When the sovereign comes into court to assert a pecuniary demand against the citizen, the court has authority, and is under duty, to withhold relief to the sovereign, except upon terms which do

justice to the citizen or subject, as determined by the jurisdiction of the forum in like subject-matter between man and man.'" (191 Fed. 266-269)

The court finally concluded, even as the court below in this case should have concluded:

> "There is no equity in the claim of the state against the plaintiffs in this case, it does not appeal to the conscience, it is met by an equitable estoppel, it was not presented or prosecuted with reasonable diligence, and a court of equity may not sustain it." (191 Fed. 270)

In *United States v. Denver & R.G.W. R. Co.* (C.C.A. 8th Circ. 1926) 16 F. (2d) 374, the United States was held to be estopped to recover certain right-of-way lands in view of the inequity of its claims, the court saying:

> "The equitable claims of a state or the United States are no stronger than those of an individual under like circumstances, and a state or the United States may waive a claim or be estopped from the assertion of a claim under circumstances that would estop an individual from the assertion of a similar claim". (16 F. (2d) 376)

In *United States v. Chandler-Dunbar Water Power Co.* (C.C.A. 6th Circ. 1907) 152 Fed. 25[1], it was claimed, even as it is claimed here, that the patent under attack was issued in excess of jurisdiction from the Land Department and therefore should be cancelled. The Circuit Court

[1] Affirmed in *United States v. Chandler-Dunbar Water Power Co.* (1908) 209 U. S. 447, upon the ground that the suit was barred by the federal statute of limitations. See discussion, pages 33-35, *supra*.

of Appeals for the Sixth Circuit indicated, however, that relief should be denied upon grounds of equitable estoppel, saying:

> "Following the ancient common-law maxim, 'nullum tempus occurrit regi,' it has been settled as the rule here that the United States is not affected in respect to its pursuit of remedies by mere delay or general statutes of limitation. But when it sues in equity as a private suitor on a cause of action relating to its proprietary interests, it is held to be affected by those equities which are recognized as fundamental in controversies between private parties. And why should this not be so? It derogates from the dignity and character of the government to suppose that, formed as it is to secure impartial justice between individuals, it may nevertheless in the conduct of its own affairs, without regard to the principles it represents, perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another." (152 Fed. 40-41)

The subject is so thoroughly and ably covered in *Iowa v. Carr* that we forbear further citation. That case has repeatedly been cited and followed. The rule it announces is not only good law, it is good common sense.

The opinion below refers to a number of decisions by this Court in support, so it is claimed, of a rule that the United States may not be estopped. We respectfully submit that those cases do not stand for any such general proposition and that an examination of them will disclose that in none of them would a private individual, upon the facts, have been estopped.

The case principally relied upon is *Utah Power & Light Co. v. United States* (1917) 243 U. S. 389. In that case the power company was using certain lands in a national forest reservation and claimed that it had the right to use them without obtaining a license or permit from the Secretary of the Interior. As stated by this Court:

> "The principal object of the suits, as is said in one of the briefs, is to test the validity of these asserted rights, and, if they be found invalid, to require the defendants to conform to the legislation of Congress, or, at their option, to remove from the government lands." (243 U. S. 403)

There was no showing that it would have been inequitable to require the power company to obtain the necessary permit and to pay the fees required by law. On its behalf it was claimed that when the forest reservations were created and understanding was had, as this Court stated, with "some unmentioned officers or agents of the United States" to the effect that the reservations would be no obstacle to the construction and operation of the company's works under a statute which required no license or permit. It was also claimed that agents of the United States forest service, who had knowledge of the company's construction work, made no objection until after the works were completed and in operation. Upon these facts this Court held, and most properly, that the government was not estopped to require the power company to obtain the required permits and licenses. Obviously, upon such a state of facts no private litigant would

have been estopped. The case presents no parallel to the one at bar and certainly is not authority for the general proposition that the United States is not subject to a plea of equitable estoppel.

The other cases cited in the opinion below are even less in point. *Lee Wilson & Co. v. United States* (1917) 245 U. S. 24, presented these facts: In surveying a certain township in Arkansas the government surveyor showed by a meander line the existence of a lake the lands under which, of course, he did not survey. In point of fact there was no lake in the township, the meandering being the result either of fraud or mistake. Later, when the error was discovered, the General Land Office ordered the previously unsurveyed area to be surveyed and sold. The defendants had purchased lands bordering upon the meander line and by reason of that fact claimed riparian ownership of the lands indicated upon the plat as the lake. Since there was in fact no lake upon the ground, it was impossible that the defendants could, as a result of their occupation of the land, have relied upon any supposed riparian rights in the non-existent lake. This Court's entire discussion of the issue of estoppel is the following:

> "C. The assertion that an estoppel against the United States arose from the fact that the administrative officers of the government, before the discovery of the fraud or error as to existence of the lake, had treated the area meandered as subjected to the riparian rights of the abutting owners under the state law, and consequently not subject to be disposed of by the United States, in substance but disregards the right to correct such error conclusively

> recognized as existing in the administrative offices of the Land Department by the decisions which we have previously cited." (245 U. S. 31).

It requires no exposition to show that such a case is no authority for the proposition that the government may not be estopped.

Jeems Bayou Fishing and Hunting Club v. United States (1923) 260 U. S. 561, also cited in the opinion below, is similar to the *Lee Wilson* case. There, in making a survey the government surveyor showed the southwest quarter of the section as fractional and depicted it as a peninsula jutting out into a lake. This supposed peninsula purported to be surveyed by courses and distances. In point of fact there was no such peninsula and, as this Court observed, the omission from the survey of the lands in the supposed peninsula was the result of such gross and palpable error as to constitute in effect a fraud upon the government. The Court held, in line with the holding in the *Lee Wilson* case, that the unsurveyed lands could be surveyed and sold. The entire discussion of the issue of estoppel is contained in the following excerpt from the Court's opinion:

> "But it is asserted that plaintiff is estopped from claiming title to the land because of certain correspondence with the Commissioner of the General Land Office, in 1897, wherein that officer said that there were no unsurveyed lands in the locality in question, and because of an official letter from the director of the Geological Survey to the same effect. It is clear, however, that the United States cannot be estopped. Lee Wilson & Co. v. United States, 245

U. S. 24, 62 L. ed. 128, 38 Sup. Ct. Rep. 21; Utah Power & Light Co. v. United States, 243 U. S. 389, 408, 61 L. ed. 791, 818, 37 Sup. Ct. Rep. 387." (260 U. S. 564)

It must be evident that upon the facts there disclosed the United States could not be estopped. Those facts would fall far short of creating an estoppel against a private litigant.

Finally, the opinion below cites *Cramer v. United States* (1923) 261 U. S. 219. That was a suit brought by the government on behalf of certain Indian wards to cancel a patent issued under the Railroad Act of 1866, upon the ground that certain of the lands embraced within the patent at the time of the Act were and ever since had been occupied by these Indians and therefore were excepted from the railroad grant. This Court held that the patent could be cancelled as to the lands actually occupied by the Indians. With respect to the issue of estoppel the whole discussion in the opinion is this:

> "Neither is the government estopped from maintaining this suit by reason of any act or declaration of its officers or agents. Since these Indians, with the implied consent of the government, had acquired such rights of occupancy as entitled them to retain possession as against the defendants, no officer or agent of the government had authority to deal with the land upon any other theory. The acceptance of leases for the land from the defendant company by agents of the government was under the circumstances, unauthorized, and could not bind the government; much less could it deprive the Indians of their rights. See and compare Lee v. Munroe, 7

Cranch. 366, 3 L. ed. 373; Whiteside v. United States, 93 U. S. 247, 257, 23 L. ed. 882, 885; Dubuque & S. C. R. Co. v. Des Moines Valley R. Co., 109 U. S. 329, 336, 27 L. ed. 952, 954, 3 Sup. Ct. Rep. 188; Pine River Logging & Improv. Co. v. United States, 186 U. S. 279, 291, 46 L. ed. 1164, 1170, 22 Sup. Ct. Rep. 920." (261 U. S. 234)

The *Cramer* case plainly does not stand for any general proposition that the United States may not be estopped. Manifestly, in that case there was no basis for an estoppel in view of the fact that the Indians had been in the actual possession of the lands and had enclosed them,—facts which must have been known to those dealing with the land.

It is submitted that none of the cases cited in the opinion below is an authority that in a case such as we have here the United States may not be estopped. On the contrary, *Iowa v. Carr* and the other decisions to which we have referred affirmatively show that the government may be estopped.

We respectfully urge that the court below erred in holding that as a matter of law the defense of equitable estoppel was not available against the government.

V.

UPON THE MERITS, THE EVIDENCE PLAINLY SHOWED THAT THE LANDS IN SUIT WERE NOT A PART OF MARE ISLAND, WERE NOT GRANTED TO CASTRO AND WERE NOT EMBRACED WITHIN THE CONFIRMATION DECREE, AND THE COURT BELOW ERRED IN OVERTURNING THE TRIAL COURT'S FINDING TO THAT EFFECT.

The decision of the majority below is not only inequitable and unjust—upon the facts it is wholly uncalled for. As the dissenting opinion makes clear (R. V—167-169), the whole matter should be disposed of by construing the confirmation decree as it is written—and as it was construed by the trial court—as embracing only the lands called Mare Island.

We are not unmindful that ordinarily a question of fact is not available upon certiorari. Where, however, such a question goes to the very root of the matter we believe it is open to this Court to dispose of the cause by determining the fact issue. More especially is this true where, as here, the court below has usurped a field not allotted to it, and, in total disregard of Rule 52(a) of the Federal Rules of Civil Procedure that "findings of fact shall not be set aside unless clearly erroneous", has upset a finding supported by the great weight of the evidence.[1]

The trial court expressly found that the lands in suit were never known as or referred to as or by the name of Mare Island, that they were not a part of Mare Island and were not embraced within the Castro Grant nor within the decree of confirmation of the Board of Land

[1]Compare *National Labor Relations Board v. Waterman S. S. Corp.* (1940) 309 U. S. 206, 207-209.

Commissioners. (R. I—261) These findings, if supported by the evidence, are conclusive of the entire controversy. That they are supported by the overwhelming weight of the evidence appears from the record.

The government in its brief opposing the granting of certiorari claims (Govt's. Br. p. 12) and the majority below have in effect held (R. V—154), that, whatever the facts may have been as to the true extent of Mare Island or as to what was in truth granted to Castro, the decree of the Board of Land Commissioners confirming the Castro Grant covers the lands in controversy here and is therefore conclusive in favor of the government. The argument necessarily stands or falls according to whether the government's construction of the confirmation decree, adopted by the majority below in defiance of the findings and in direct conflict with the results of the *Irwin* case, is or is not supportable. It is submitted that, in the light of the facts of record, the construction is plainly wrong and cannot be sustained.

The issue here is the scope and effect of the confirmation decree, so we turn to the language of that decree. The entire decree (omitting the title and signatures) is as follows:

> "In this case after hearing the proofs and allegations, it is adjudged by the Commission that the claim of said petitioners is valid, and it is therefore deemed that their application for a confirmation thereof be allowed.
>
> "The place of which confirmation is hereby given is situate in the Bay of San Francisco and is called 'Isla de la Yegua' or Mare Island and being an Island is bounded by the water's edge." (R. V—70)

The Court will note that the second paragraph alone describes what is confirmed. That description contains two separate references or calls: one for the place that "is called 'Isla de la Yegua' or Mare Island" and the other for an island "bounded by the water's edge". The question presented is—Do these two calls conflict and, if they do, which one is to control?

The only land ever known as or called Mare Island is the high and dry land which bears that name on the maps. See map opposite page 3 *supra* and discussion at pages xvii-xxviii of the appendix. Even the majority opinion below does not assert that any other land, particularly the land involved here, was ever called Mare Island.

Coming now to the second call, it is to be observed that the words "water's edge" are not words of art and have no precise meaning in law. Assuming they mean the ordinary water boundary, according to the Mexican law—which was the law of the grant—they would mean, as we shall see, the line of highest high-water throughout the year and, so construed, they would agree exactly with the first call, which embraces only the high land known as Mare Island. If, however, the words "water's edge" be construed to mean the common law line of ordinary high-water mark, as the majority below have held (R. V—155-156), then they would call for all of the lands now in controversy,[1] would expand the Castro grant more

[1]Even so construed they would not include that portion of the lands of petitioner James Irvine which lie to the north and east of Boat-Cut-off or Dutchman's Slough. The majority below have held these lands are not embraced within the confirmation decree and as to them they affirmed title in Irvine. (R. V—161, 166) The government has not sought to review this ruling.

than five fold and would create a direct conflict with the first call.

In this situation we are utterly at a loss to understand how it is that the majority below felt compelled to give the second call of the decree, construing it according to the common law, controlling effect. The majority have not held and upon the record could not hold that any of the land involved in this suit was ever called Mare Island or was ever known by that name. They simply treat this fact, and the first call of the decree as well, as being without relevancy. (R. V—157)

Nor have the majority below held that the Mexican authorities ever granted these lands to Castro. It is plain that under the Mexican law these lands did not pass by the grant. But the majority below have held that this, too, is of no consequence—the decree must be construed according to the common law and the line of ordinary high-water mark must be given controlling effect. (R. V—155-158) Assuming the decree must be construed according to the common law, yet when it appears, as it unmistakably does in this case, that so construing it results in a conflict in the calls of the description, there is nothing in the common law that says that the call which would make the decree erroneous and would confirm five times as much land as was granted must control over an equally positive call which is in accordance with the grant as made. The majority below have totally ignored the common law principle of construction, so well stated in 1 *Freeman on Judgments* (5th ed.) §76:

> ". . . of two interpretations of the language of the judgment, that one will be adopted which makes

it correct and valid, in preference to the one which would make it erroneous."

Lest our position be misunderstood, we wish to make it clear that we do *not* contend that the confirmation decree may now be attacked because of error. If the decree had stated unmistakably and unequivocally that the lands confirmed embraced all of the lands in suit, then, no matter how erroneous such a ruling would have been, it would nevertheless have concluded the matter. But where, as here, the description in the decree contains calls which, if we construe the second as the majority below have said it must be construed, are conflicting, the Court necessarily must construe the decree and resolve the conflict and it is elementary that that construction should be adopted which will make the decree correct and in accordance with the grant. Especially is this true where, as in this case, there is nothing in the proceedings before the Board to indicate any intention other than to confirm the grant as made.

This situation—of a conflict in the calls of a confirmation decree—is by no means a new one. In *United States v. De Haro* (1862) 25 Fed. Cas. 803, #14938, Judge Hoffman, who probably decided more Mexican land grant cases in California than any other judge,[1] had before him precisely this same situation,—of a confirmation decree with conflicting calls and a contention that the decree in fact confirmed more land than was granted. His holding was just what in our view the holding of the majority below should have been:

[1]See his published decisions entitled *Hoffman's Land Cases*.

> "If the language of the decree were explicit and unequivocal, it might be too late now to disturb it, notwithstanding that it might give to the claimants more than they asked for, or any of their witnesses pretended they were entitled to. But in so clear a case of mistake I consider it my duty to lay hold of any ambiguity or discrepancy in its language to enable me to restrict the confirmation to the land actually granted and occupied and claimed." (25 Fed. Cas. 805)

The courts have often been faced with the problem of construing instruments containing descriptions calling for a place by name and also giving some other conflicting call. For convenient reference we give a number of cases in the appended footnote where a call for a place by name, being correct and in accordance with the intention of the instrument, was held to control some other conflicting call, even one by specific metes and bounds.[1]

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[1] In *Parker v. Kane* (1860) 22 How. (63 U. S.) 1, the description read:

> "Lots one (1) and Six (6) being that part of the northeast quarter lying east of the Milwaukee river * * *"

and it was held that the call for the lots by number controlled the call for that part of the northeast quarter lying east of the Milwaukee River which embraced a considerably larger area.

In *Wise v. Watts* (C. C. A. 9th Circ. 1917) 239 Fed. 207, the description read:

> "all that certain tract, piece or parcel of land lying and being in the Santa Rita Mountains in the territory of Arizona, U. S. A., containing one hundred thousand acres, be the same more or less, granted to the heirs of Luis Maria Cabeza de Baca by the United States and by the said heirs conveyed to the party of the first part by deed dated on the 1st day of May, A. D. 1864, bounded and described as follows: Beginning" and so on by courses and distances "the said tract of land being known as Location No. 3 of the Baca Series * * *"

and it was held that there were three separate calls or descriptions and that the calls for the tract by name (i. e., as the tract granted to the heirs of

Upon the merits it is plain that the confirmation decree was intended to be consistent with the Castro grant and was intended to confirm the place "called Mare Island". The majority of the court below have erred in failing to give the decree that effect. This error not only results in a decree that is harsh and unjust, but results in a conflict with the decision in the *Irwin* case upon the identical question that tends to bring the judicial process into disrepute.

In our argument we have asserted that according to the Mexican law the grant to Castro was confined to the high and dry land of Mare Island and excluded all of

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Baca and as Location No. 3 of the Baca Series) controlled the metes and bounds description.

In *Piper v. True* (1869) 36 Cal. 606 the description was:

> "One undivided half part of all that certain tract or parcel of land situate, lying and being in the County of Contra Costa, in the State of California, known as the 'Rancho Canada del Hambre y las Bolsas', being the tract of land upon which the Town of Martinez is situated, and the same confirmed to said Teodora Soto by decree of the District Court of the United States for the Northern District of California, and surveyed by order of the Surveyor General of the United States for California, by A. W. Von Schmidt, Deputy Surveyor, in March, 1860, and approved by said Surveyor General; the said tract, according to said survey, containing thirteen thousand three hundred and twelve and seventy-one-hundredths acres of land; saving and excepting therefrom the piece of land now occupied and inclosed by the parties of the first part, * * *".

and it was held that there were five calls and that the calls for "Rancho Canada del Hambre y las Bolsas" and "the land confirmed by the District Court of the United States" were controlling.

In *Haley v. Amestoy* (1872) 44 Cal. 132, the description was:

> "All the undivided two thirds (2/3) of all the lands known by the name of 'Rancho de San Vicente,' lying and being situate in the County of Los Angeles, and State of California; the lands of said rancho being known and described as follows: to wit: Beginning" and so on by courses and distances,

and it was held that the call "Rancho de San Vicente" controlled the courses and distances.

the land in controversy here and that none of this land was ever known as or called Mare Island and hence was not confirmed by the confirmation decree. This Court is entitled to a showing that these assertions are supported by the record. For this purpose we have set forth in the appendix a review of the evidence on these points, with appropriate references to the record.

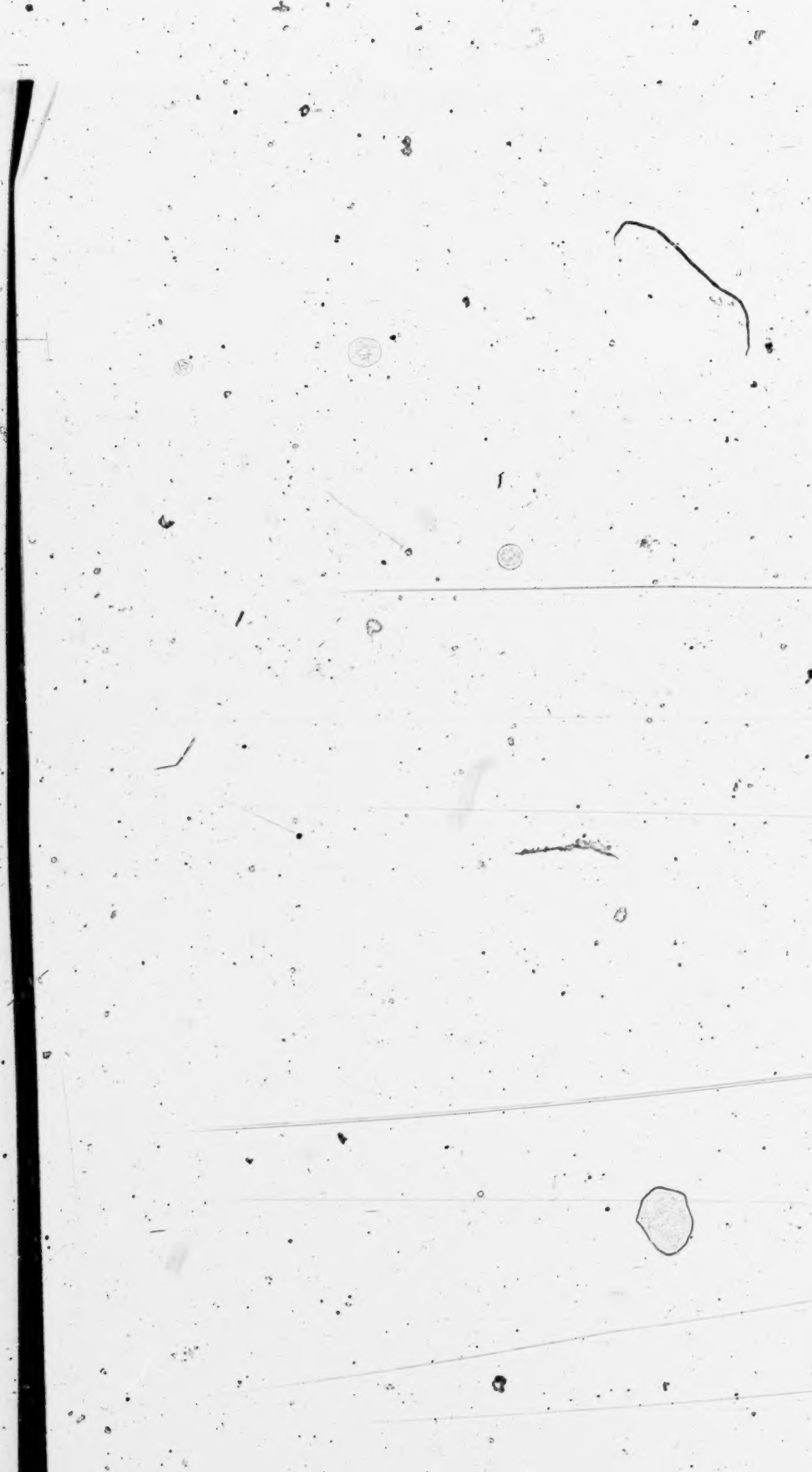
The decree of the Circuit Court of Appeals is erroneous and grossly inequitable. It should be reversed and the judgment of the District Court affirmed.

Respectfully submitted,

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Dated: San Francisco, California,
March 11, 1942.





APPENDIX

A.

Under the Mexican law the Castro grant ran only to the line of highest high-water, which excluded all of the tule marsh to the northwest of Mare Island i

B.

The grant to Castro and the confirmation decree cover only the land called Mare Island, which excludes all of the land in suit xvii

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Appendix

A.

Under the Mexican law the Castro Grant ran only to the line of highest high-water, which excluded all of the tule marsh to the northwest of Mare Island.

In considering the scope and effect of the confirmation decree, it is both necessary and appropriate to take into account what in fact was granted to Castro.

> "It is always proper to consider what the judgment should have been, since it will be 'presumed that the court intended to adjudge correctly in law upon the facts of the case,' . . . "[1]

Inasmuch as the grant to Castro was made by the Mexican authorities under the Mexican law, our problem is, therefore, first to determine what, according to that law, would pass by a grant of an island and then to determine what, in the light of that law, actually passed to Castro. The record shows that under the Mexican law a grant to a private person of land bordering upon tide-water carries, not to the line of ordinary high-water mark as at common

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[1] *Freeman on Judgments* (5th ed.) Sec. 76. As Freeman further points out in Section 77:

> "In case of doubt regarding the signification of a judgment, or of any part thereof, the whole record may be examined for the purpose of removing the doubt. One part of the judgment may be modified or explained by another part; and uncertainties in the judgment may become certain under the light cast upon them by the pleadings or other parts of the record. This is well illustrated in those cases in which the description of property in the judgment is supplemented and made certain in this manner. And the judgment will not be given a more extensive effect in this respect than is warranted by the record."

law, but only to the line of highest high-water throughout the year, and that in this case the isthmus or "neck" of tule marsh between Mare Island and the swamp lands in Survey 569 was well below the line of highest high-water and therefore the grant to Castro embraced none of Survey 569.

As to what the Mexican law was, we think there is no room for a reasonable difference of opinion. In *Borax Consolidated, Ltd. v. City of Los Angeles* (1935) 296 U.S. 10, this Court in discussing the difference between the civil law, which prevailed in Mexico, and the common law authoritatively stated:

> "By the civil law, the shore extends as far as the highest waves reach in winter. Inst. lib. 2, title 1, §3; Dig. Lib. 50, title 16, §112. But by the common law, the shore 'is confined to the flux and reflux of the sea at ordinary tides.'" (296 U.S. 22)

The federal courts take judicial notice of the Mexican law at the time when California belonged to Mexico. *Fremont v. United States* (1855) 17 How. (58 U.S.) 542, 557; *United States v. Chaves* (1895) 159 U.S. 452, 459; *Crespin v. United States* (1897) 168 U.S. 208, 212. For convenient reference, however, we produced expert testimony upon the point. Professor Max Radin, whose qualifications were not questioned (R. II—617-618), after translating the official laws of Mexico and quoting from the leading work on the subject, *Hall's Laws of Mexico*, testified:

> "Q. Will you kindly state to what line under the Mexican law which was in effect in 1840 and 1841 in

California, a grant of land made by the Mexican authorities would go where the grant is to the sea, or a bay, or strait, or other body of water as a boundary?

A. It would go to the highest high tide of the year.

Q. In case the Mexican authorities made a grant of an island, will you state to what line under the Mexican law that grant would go?

A. To the same line, in my opinion.

Q. And that was the law in 1840 and 1841, and during the entire Spanish-Mexican regime in California?

A. It was.

Q. And that would apply to grants made to private individuals under Mexican colonization laws?

A. There would be no difference applied to any branch.

Mr. Lipman: Take the witness.

Miss Phillips: No questions." (R. II—624)

The majority below have not doubted that this is a correct exposition of the Mexican law nor has the government produced any authority to the contrary. In view of this Court's expressions in *Borax Consolidated Ltd.* the applicable Mexican law may be deemed settled.

This brings us to the next question,—whether the swamp land to the northwest of Mare Island, particularly the narrow strip in the "neck", was below the line of highest high-water throughout the year and thus, under the Mexican law, cut Mare Island off from the swamp lands in Survey 569. Upon this question there is no con-

flict. The government's evidence, as well as our own, demonstrates that the tule marsh in the neck was below the line of highest high-water.

Two eye witnesses testified to the natural conditions as they existed prior to the time that the government leveed and reclaimed the swamp lands in the area of the neck. These were George Cross, son of Dr. Cross, who lived on and managed Island No. 1 or Cross Island for about nine years commencing in 1898 (R. II—526, 530, 532) and Frank H. Greene, who was an engineer employed by the government at the Navy Yard for about six years commencing in the latter part of 1897. (R. II—539, 546)

Witness Cross testified that he was familiar with the area to the northwest of Mare Island referred to in the record as the "neck" and that he had frequently seen it under water at high tide. (R. II—527-528, 532-536) Witness Greene testified that his principal duties at the Navy Yard were to supervise dredging operations (R. II—539); that he frequently had had occasion to observe the area referred to as the "neck" northwest of the machine shop (R. II—540-541) on account of the fact that a large amount of the spoil from the dredging operations was dumped there (R. II—541); and that when he was there at times of high tide he had seen the whole area under water (R. II—540). It may appropriately be added that the conditions in 1896 and later, as to which witnesses Cross and Greene testified, were less favorable for frequent overflow of the neck than were the conditions in 1841 or 1852 because, as both Captain Carlson and Lieutenant Smith testified, the natural process at this point has been

one of accretion and not of cutting or lowering. (R. II—523, 590-592)

The testimony of the eye witnesses was uncontradicted. The statement in the opinion below that the record leaves the matter substantially in doubt (R. V—155-156) has no support. Lieutenant Smith, of the Coast and Geodetic Survey, the government's expert map witness, expressly testified that there was nothing on any of the Coast Survey charts prior to 1900—i. e., prior to the government's reclamation work—that indicated that water had not gone over the neck in a broad sheet. (R. II—604-606).

Not only was the testimony of the eye witnesses uncontradicted, but the government's expert testimony shows to a point of demonstration that the conditions were precisely as the eye witnesses testified. The experts testified to the elevation of the swamp lands in the neck and they also put in evidence tide-gauge readings at Mare Island showing that, even in months of lowest tide, the water was frequently higher than the elevation of the neck and that therefore the water covered all of this land.

As to the elevation of the tule marsh in the neck, we first have the positive testimony of Captain Carlson, a Captain in the Corps of Civil Engineers of the Navy who served a number of tours of duty at the Navy Yard commencing in 1916 (R. II—557-558), that the elevation was at the minimum 2/3rds of a foot. When asked by his own counsel why he used that figure, he testified:

> "A. We actually found it by the survey and by also checking with the Sloat Board findings. They

> found the same average height along the marsh on the east side of the island." (R. II—582)

The testimony is, therefore, that the elevation was measured by actual survey and checked against the Sloat Board's report.

The Sloat Board's findings were made in connection with its extensive investigations of Mare Island and surrounding areas when the Navy Yard was originally laid out in 1852. (Ex. F—1, R. II—395, III—13, 26-34) In referring to their investigations of the tule marsh area on the easterly side of the Island toward Vallejo, the report says

> "... after boring through 6½ feet of this clay, sand stone was reached at 29½ feet below the surface of the tule, which is generally 67/100ths of a foot above ordinary high water." (R. III—31)

Plan No. 8 prepared by the Sloat Board to accompany the report was introduced in evidence as Exhibit F-2 (R. II—395) and has been reproduced in the record (R. IV—2) and shows at a number of points that the elevation of the tule marsh is only 67/100ths of a foot above ordinary high-water mark. Captain Carlson testified as an expert that these findings of the Board checked with his own studies.

Lieutenant Smith, the government's other expert, stated that none of the Coast Survey charts or surveys showed elevations, other than to indicate that the tule was above ordinary high-water mark. (R. II—487-488) He expressed the opinion, however, that the elevation of the marsh

was at least 1 foot. (R. II—606) He referred to some measurements which indicated that on a sand ridge the elevation was found to be 1.2 feet (R. II—607) and he finally concluded that the elevation "must have been approximately a foot." (R. II—608-609)

We have, therefore, as the government's evidence on this subject the testimony of Captain Carlson that the elevation was at a minimum of 67/100ths of a foot; this testimony is confirmed by the Sloat Board's findings; and we have the testimony of Lieutenant Smith that the elevation was approximately a foot. Whichever figure be taken to be correct, the readings of the tide-guage at Mare Island show that this was frequently below the line of the higher tides.

The tide-gauge readings consist of three sheets which were offered in evidence as the government's Exhibit R. (R. II—573, IV—21, 22 and 23) We reproduce them opposite the following page.

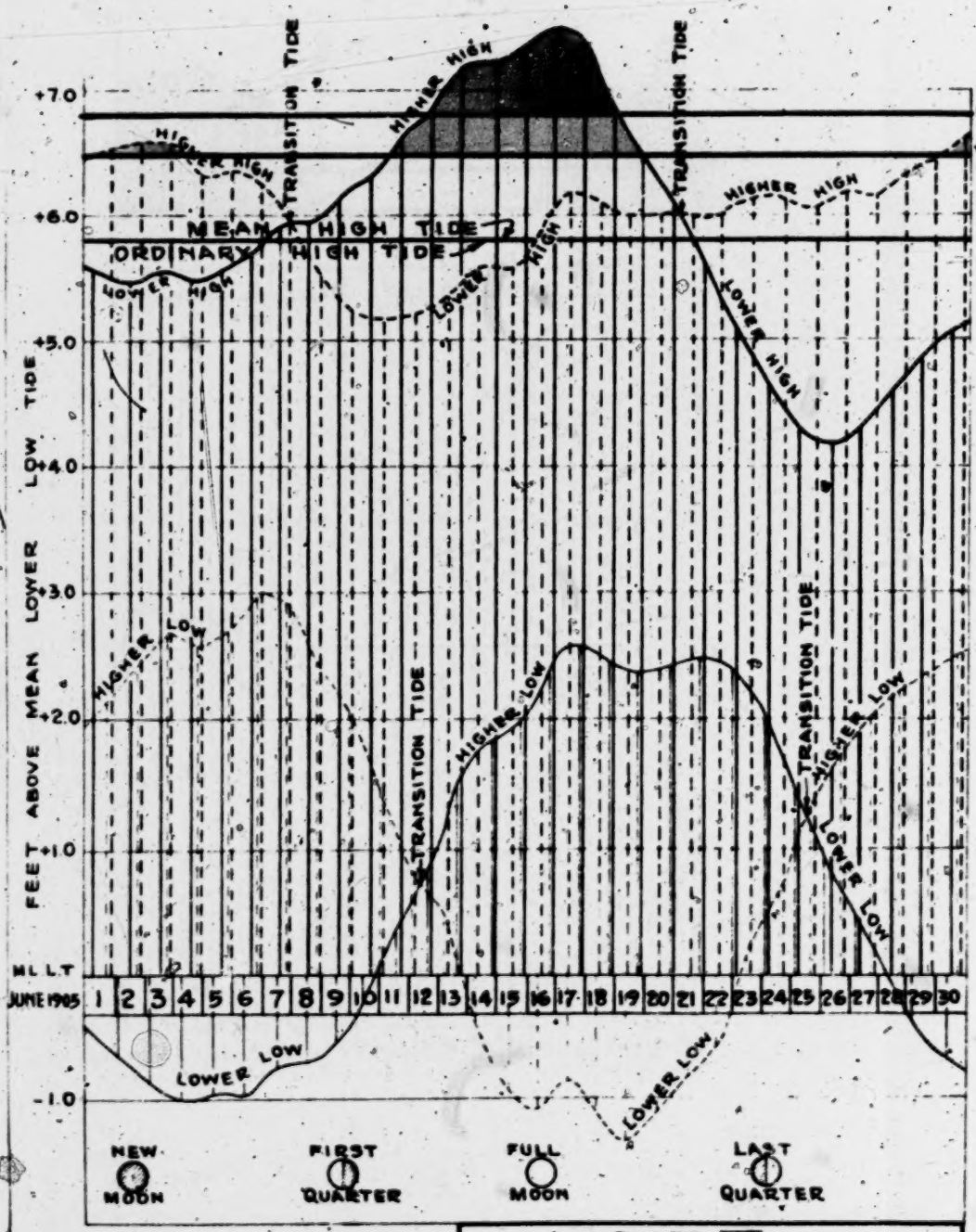
The Court will note the heavy black horizontal line marked and representing the line of "mean high tide" or "ordinary high tide" between elevations +5.0 and +6.0. It is at elevation +5.8, the testimony of Captain Carlson being that mean high tide at Mare Island has been established at 5.8 feet above the line of mean lower low water. (R. II—572) To show graphically how frequently the tule marsh was under water we have drawn one line 2/3rds of a foot above this "mean high tide" line and another 1 foot above that line. The areas colored in red indicate the times when the water was more than 2/3rds of a foot above mean high-water mark

and the areas colored in blue signify the times when the water was more than 1 foot above mean high-water mark.

The exhibit states that the month of November 1929 was selected because its tides were close to the long-time average. And yet in that month, accepting Captain Carlson's determination of the elevation of the tule marsh, water would have covered the neck on 13 separate days with one period of 7 consecutive days. If we adopt Lieutenant Smith's estimate of the elevation of the tule marsh, the neck would have been under water on 8 separate days, with a period of 6 consecutive days. And this is in an *average* month!

The month of February, 1905 was selected as showing relatively high water. In that month the tule marsh in the neck would have been under water no less than 20 days if we accept Captain Carlson's figure, with one period of 7 consecutive days and another of 13 consecutive days. On many of those days the water is shown going over the neck twice during the day. Even taking Lieutenant Smith's figure of 1 foot as representing the elevation of the tule marsh, the neck would have been under water on 12 separate days and on 3 of those days it would have been covered twice.

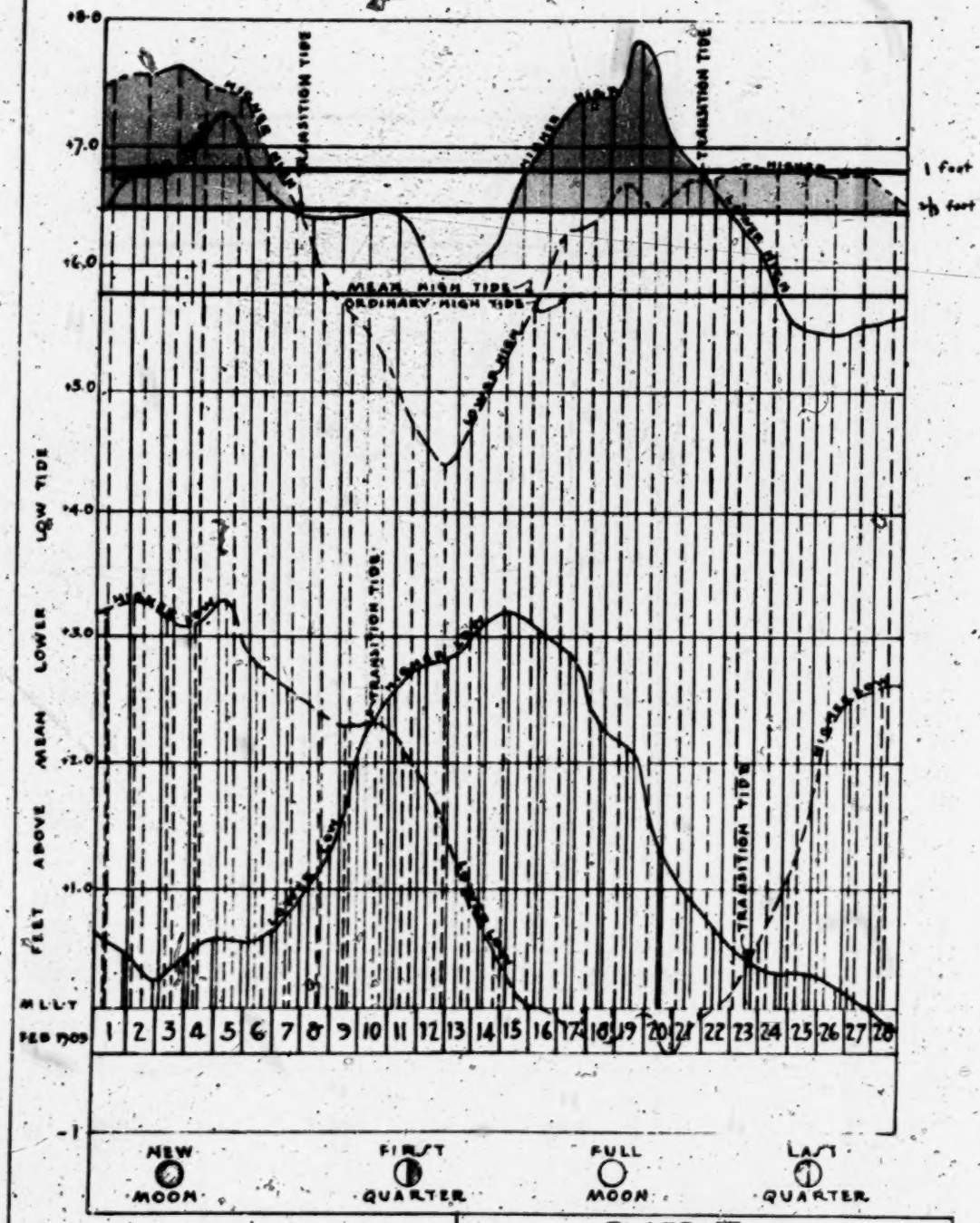
If we take an abnormally low month such as June 1905, we find that upon the basis of Captain Carlson's testimony the neck would have been under water on 9 consecutive days and if we take Lieutenant Smith's figure it would have been under water at high tide on 6 consecutive days.



NOTE :-
YEAR selected because prior to construction of training dikes in Mare Island Strait.
MONTH Selected because of unusually Low Tides

PLATE VII
TIDAL REGIMEN
MARE ISLAND STRAIT
For the Dry Season Month of
JUNE 1905
as recorded on the automatic tide gauge
AT THE CAUSEWAY NORTH OF THE MACHINE SHOP (STEAM ENG'G. BLDG.)

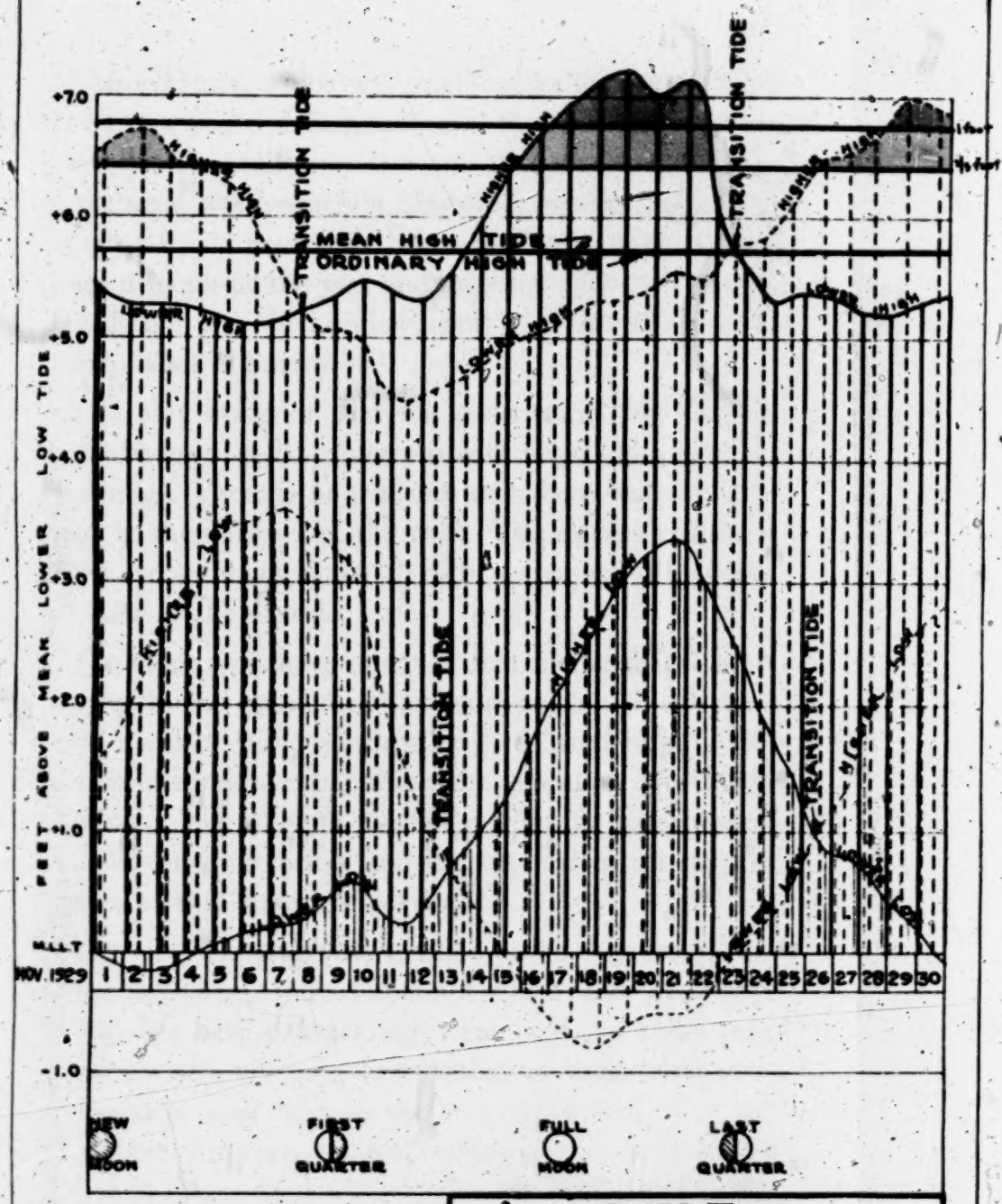
Compiled & Drawn by	Under Direction of
John F. Greathead Associate Civil Engineer Navy Yard, Mare Island, Calif.	C. A. Carlson Captain C.E.C., U.S. Navy of the Bu of Yds & Docks Navy Dept Washington D.C.



NOTE:-
YEAR selected because prior to construction of training dikes in Mare Island Strait
MONTH Selected because of unusually High Tides

PLATE VI
TIDAL REGIMEN
MARE ISLAND STRAIT
For the Rainy Season Month of
FEBRUARY 1905
as recorded on the automatic tide gauge
AT THE CAUSEWAY NORTH OF THE
MACHINE SHOP (STEAM ENG'G. BLDG)

Compiled & Drawn by:-	Under Direction of:-
John F. Greathead Associate Civil Engineer Navy Yard, Mare Island, Calif.	C. A. Carlson Captain C.E. U.S. Navy of the Bu. of Y.&D. Navy Dept. Wash. D.C.



NOTE:-
Month selected because its tides were close to long-time-average elevations

PLATE V
TIDAL REGIMEN
MARE ISLAND STRAIT
For the representative month of
NOVEMBER 1929
as recorded on the automatic tide gauge
AT THE CAUSEWAY NORTH OF THE MACHINE SHOP (STEAM ENGG. BLDG.)

Compiled & Drawn by:
John P. Smethurst
Associate Civil Engineer
Navy Yard, Mare Island, Calif.

Under Direction of:
C. A. Carlson
Captain, C.E.C., U.S. Navy
of the Bu. of Yds. & Docks, Navy Dept., Wash. D.C.

This evidence, which was produced by the government, shows to a point of demonstration that the eye witnesses saw what they said they saw and that was that the area of the neck was frequently completely under water. This being so, it was necessarily below the line of highest-high-water throughout the year and therefore Mare Island was, according to the Mexican law, completely cut off from the swamp lands in Survey 569.

The only evidence that the government has claimed might be urged to be contrary is with respect to a so-called sand ridge. There is no evidence that there was any sand ridge at the narrows of the neck. The express testimony of the eye witnesses is that all of that area was tule marsh. We turn to the record.

The Court will have observed that in the diagram appearing in the opinion of the court below (R. V—149) there is a dotted line which is marked "sand ridge". This line would indicate that this ridge ran clear over to the high land. The diagram was taken from the government's brief in the court below and has no evidentiary support. We make this statement advisedly.

The only witnesses who testified to the existence of any ridge, *anywhere*, were Captain Carlson and Lieutenant Smith. We have painstakingly examined the entire testimony of both witnesses and neither of them testified to any sand or sand ridge in the area of the neck. The fact that these witnesses testified extensively as to the sand and sand ridges elsewhere (R. II—446-448, 559-568, 585, 602-603) but made no mention of a sand ridge at the narrows of the neck is not without significance.

The eye witnesses who did testify as to conditions at the neck—and their testimony relates to a time before the government filled in the land—were specific that the area was marsh land. George Cross, who knew this area as early as 1896 (R. II—524), testified:

> "Q. What was the condition of that area when you first knew it?
> "A. It was all marsh land." (R. II—527)

Frank Greene, who knew the area as early as 1897 (R. II—539), testified as follows:

> "Q. What was its condition when you knew it?
> "A. It was marsh land. At high tides the water went over it. Most of it was covered with what we call tules, a kind of weed that grows in salt water." (R. II—540)

This evidence is specific and uncontradicted. The government claims, however, that Exhibit T shows there was a sand ridge at the neck. This exhibit (R. II—586, IV—28) requires brief comment. The Court will observe that Station No. 48 on the exhibit is a profile taken at the narrow portion of the neck. There is marked upon this profile what purports to be a sand ridge. In so far as the profile shows a sand ridge at this point, it is in direct conflict with the testimony of Captain Carlson under whose supervision the exhibit was prepared and with the legend on the exhibit itself which states how the exhibit was made.

The cross-sections purport to give the elevations as they were actually found to exist in 1906, 1917 and 1931, and as they were *assumed* to have existed in 1852. (R.

II—579, 581-582) Captain Carlson testified that the lines indicating the assumed elevations of the marsh area in 1852 are not based upon any actual measurements made as of that time, but are based upon *assumed* conditions. (R. II—588-590) The line of 1852 was derived as follows: the Sloat Board's investigations, and apparently those made by Captain Carlson (R. II—582), disclosed that the marsh on the Napa Creek side was at an elevation of .67ths of a foot. Using this as a datum or starting elevation, the lines of 1852 were then drawn parallel to the profile lines of 1906, which were taken from the government's contour map prepared by Rousseau. (R. II —581-583) Rousseau's map of 1906 is expressly stated on Exhibit T to be the earliest contour map of the area in existence and presumably it was used because it was the earliest map showing conditions at the narrows of the neck prior to the leveeing and filling in of the area.

When we examine the profile at the critical Station 48 we find that the line of 1852 has not been drawn as Captain Carlson and the exhibit itself say it should have been drawn, but, without any evidentiary support, has been drawn to show a sand ridge. To be specific, the line of 1852 starts in on the easterly side, above the area marked "original low land", at precisely the same elevation as the line of 1906. Instead of paralleling the line of 1906, however,—as the exhibit itself and Captain Carlson said it should—it parallels the line of 1906 for a short distance and then suddenly departs from the parallel and goes up into a supposed sand ridge without a shred of evidence to warrant such departure. The 1906 line shows clearly

enough that there was no sand ridge there in 1906 and there is absolutely nothing in the record to show the existence of a sand ridge there prior to that date. Upon its face the exhibit is in error, as Captain Carlson expressly admitted it was in other particulars (R. II—613-615, 616-617), and is in direct conflict with his testimony.

Moreover, the exhibit is at war with the actual survey made by Rousseau in 1906. (Ex. S-1; R. II—576, IV—26) If the Court will look at this exhibit it will note that the levee erected by Dr. Cross is shown in bold outline on the map. The location of this levee in its relation to Mare Island may be seen by looking at the brown feathered line indicating the levee on the map opposite page 3 of the brief. The Court will observe that by dotted lines inside the levee a sand ridge is shown—though, even inside the levee, the sand ridge is not shown as continuous—whereas outside the levee, where more or less natural conditions obtained, no sand ridge is shown. Not only does Rousseau show no sand ridge outside the levee, but the elevations which he does show are considerably lower than the elevations reached by the higher tides as shown by Exhibit R.

We respectfully submit that there is no evidence that there was a sand ridge at the neck. The testimony of the eye witnesses that this area was frequently under water is uncontradicted and is demonstrated to be correct by the government's expert evidence. Certain it is that upon the record the trial court could properly have made no finding other than the one it did make,—that the lands in Swamp Land Survey 569 were not a part of Mare Island and were not granted to Castro. Under

the Mexican law Mare Island stopped at the northwesterly end of the high and dry land and did not include any of the lands involved in this case.

B.

The grant to Castro and the confirmation decree cover only the land called Mare Island, which excludes all of the land in suit.

We come now to a review of the evidence showing that none of the land in Survey 569 was ever known as or called Mare Island and hence was not included in the grant to Castro and was not confirmed by the confirmation decree. The very fact that none of this land was, under the Mexican law, a part of Mare Island explains why none of it was ever called by that name.

In determining the scope and effect of the call in the confirmation decree for the place "called 'Isla de la Yegua' or Mare Island" we shall refer primarily to the evidence introduced by the government. This evidence consists of a very large number of maps, many of them official ones published by the government, the official report of the Sloat Board and the confirmation proceedings themselves. This evidence all shows, without conflict or dispute, that the only area ever known as or called Mare Island is the high land which bears that name, as shown upon the map opposite page 3 of the brief.[1] In connec-

[1]The fact that Mare Island, the high land, was connected by a narrow neck of tule marsh with the lands in Swamp Land Survey 569 does not mean that the high land, and the high land alone, was any the less an "island", properly so called. While an island is usually entirely surrounded by water, it is a matter of common knowledge that the word

tion with the development of this point it is significant to note that the majority below have not disagreed with the trial court's finding that none of the lands in Survey 569 were ever known as or referred to by the name of Mare Island.

"island" is frequently used to describe a body of land, such as Mare Island, all or a portion of the boundary of which is marsh or swamp. This usage is not only sanctioned by good authority, but was particularly common in this vicinity where there are many bodies of land known or referred to as "islands" which are surrounded by tule marsh.

In no less an authority than

Encyclopaedia Britannica, 14th Edition, Volume XII, p. 715,

it is said:

> "The words 'island', 'isle' are sometimes used for a piece of land isolated during high tide or *surrounded by marsh*; e. g., Hayling Island, Isle of Ely."

Hayling Island, as the maps show, is a body of land off the south coast of England, just east of Portsmouth, and is connected with the mainland by a narrow neck of marsh, just as the government claims Mare Island was connected to the lands involved in this suit. As to the Isle of Ely, in Volume VIII at page 381 of the *Encyclopaedia* it is said: "Ely stands on a considerable eminence on the west bank of the Ouse, in the Isle which rises above the surrounding fens."

Also, we have many examples around San Francisco Bay of islands bounded by marsh. Our Exhibit 1, which is the State Geological Survey Map of 1873 (R. IV—34), shows Deer Island as a body of land surrounded by tule marsh to the north of Novato Creek, Simms Island similarly bounded by tule marsh to the south of San Rafael Creek, and another such island in the marsh to the north of Shoal Water Bay, which island is shown on the quadrangle map as "Green I". Similarly, in a publication entitled

Resources of Solano County,

published by the authority of the Solano County Board of Trade (1888), in the chapter dealing with topography, it is said:

> "Robinson's Island is upland rising out of the tule in Section Thirteen, in Suisun Township, and contains one hundred sixty acres of land. There are other small islands of upland rising from the swamp-land in different localities, Suisun at the head of Suisun Slough, on Section thirty-six, Township five North, Range two West, being located on hard land of this nature."

The islands referred to can be found upon the maps of the region, such, for example, as the State Geological Survey Map of 1873 and the quadrangle maps.

The Maps.

Many of the earliest maps do not show Mare Island by name. Only those which do will help us with the problem of determining what was called Mare Island.

The earliest map in the record showing Mare Island by name is Exhibit 13. (R. II—657, IV—42) If the Court will look at this map it will be noted that it was prepared by Lieutenant Ord of the United States Army in 1848 and shows a clear break at the northerly end of the high land. In order to make our position clear, we do not claim that there is or was a channel or water-course cutting across the neck at the northerly end of the high land, although we do claim that, as has been shown, that area was at such a low elevation that it was frequently covered by high water. The fact that Lieutenant Ord shows an actual break at this point is strong evidence as to what, in the early days, was considered to be Mare Island.

The next map is the Ellis map of 1850, Exhibit 11. (R. II—655, IV—40) It will be noted that the island is called "Mares Island". All of the area to northwest of the high land including the area of Survey 569, is shown as water. Again, this is significant evidence as to how low and wet the tule marsh must have been. The map indicates that the popular understanding at the time was that the high land alone was what was called Mare Island.

We next come to the well known Ringgold chart, which the government offered in evidence as Exhibit K-7. (R. II—418, IV—9) The Court will note that Ringgold, who was a Commander in the United States Navy (R. II—

415); while he shows in general outline all of the swamp land to the northwest of Mare Island, confines the name "Mare I" to the high and dry land.

We come next to the large number of official charts or maps prepared by the United States Coast and Geodetic Survey, all of which were identified and testified to by Lieutenant Smith. We shall not burden the Court with a review of these maps in detail, but will merely point out that on every one of them the name Mare Island is confined to the high land. See Exhibit L-2 (R. II—430, IV—11), Exhibit L-5 (R. II—437, IV—12), Exhibit L-6 (R. II—438, IV—13), Exhibit L-9 (R. II—452, IV—15), Exhibit L-10 (R. II—461, IV—16), Exhibit L-11 (R. II—463, IV—17), Exhibit L-15 (R. II—473, IV—19). These maps, made over a period commencing with as early as 1851 down to 1915, all consistently show the high land and the high land alone designated by the name of "Mare Island". To these should be added the Coast and Geodetic Survey map prepared especially for use in the *Irwin* case and marked Exhibit U in that case, which shows exactly the same thing. (Ex. 17, R. II—658, IV—49)

At the trial we asked Lieutenant Smith the significance of this use of the place name. He testified that the surveyor in the field ascertains what names, in local usage, are used to identify the various features (R. II—496) and that the Coast Survey, in making up its charts, uses these names if they are uncontroverted and are believed to be accurate. If the matter is controversial the Coast Survey does not show the name upon its chart until the subject has been investigated and they have satisfied their own

minds as to what the correct usage is. (R. II—497-498) When asked specifically with respect to the use of the name "Mare Island", he testified in substance that the fact that that name was always shown only upon the high land indicated that *that* was the feature known by the name and had the tule marsh to the northwest of the high land also been known by that name the maps would have so indicated by showing the name in that area as well as upon the high land. (R. II—498-504) This testimony, taken in connection with the charts themselves, well nigh concludes the matter.

In addition to the Coast Survey charts we have the maps of the United States Geological Survey. Exhibit 3 is the Napa Quadrangle (R. II—647-648, IV—36), the pertinent portions of which are shown opposite page 3 of this brief. Significantly, the lands in Swamp Land Survey 569 are marked "Island No. 1", showing that the United States Geological Survey understood that they were not a part of Mare Island. The Mare Island Quadrangle, Exhibit 2, shows the same state of affairs upon a larger scale. (R. II—625, IV—35)

The authorities of the State of California having to do with the mapping of this area agreed exactly with the federal authorities. Our Exhibit 1 is the map of 1873 prepared by the State Geological Survey of California (R. II—506) and shows the name "Mare Island" as confined to the high and dry land. (R. II—508, IV—34) The official county maps prepared by the County Surveyor of Solano County also confine the name "Mare Island" to the high land. See Exhibit 14 (R. II—657, IV—44), Ex-

hibit 15 (R. II—657, IV—46) and Exhibit 16 (R. II—657-658, IV—48).

There are other maps in the record telling the same story but we shall not burden the Court with them. The evidence in this particular is without conflict.

The Sloat Board Report.

Equally as important as the maps—indeed, perhaps of even greater importance—as indicating what was known as "Mare Island" and what its true boundaries were is the report of the Sloat Board made in 1852 (Ex. F-1; R. II—395, III—13) and the accompanying Plans No. 7 and 8 (Ex. F-2, R. II—395, IV—1 and 2).

In 1852 a board of officers under the command of Commodore Sloat was appointed by the Navy Department to examine the shores and waters of the Bay of San Francisco for the purpose of selecting a site for the navy yard and depot. (R. III—13) After an extensive examination, the Board selected Mare Island as the best site. (R. III—26) The discussion of this site is quite detailed and gives the clearest idea of any record extant, so far as the researches of counsel could discover, as to what was known as Mare Island.

First of importance to note is that the Board made and returned with its report as Plan No. 7 what is described in the report itself as "Plan of Mare Island showing the Topography of the land, and soundings through Mare Island Straits". (R. III—13) This plan is shown at page 1 of Volume IV of the Record. In looking at this plan the Court will observe the significance of the statement in the

report that this is a plan "of Mare Island" and that it shows "the Topography of the land". If the 8 miles of tule marsh to the northwest had been regarded in those days as a part of Mare Island we should not find a plan of the high land alone referred to as a plan "of Mare Island", especially when the very next plan referred to in the report states that it is a "Plan of *part* of Mare Island, showing the positions of the several proposed buildings and other improvements". (R. III—13) It was evident that the Board was precise in stating whether it was referring to Mare Island or only to a part of Mare Island.

The report does not leave this conclusion merely to inference, however. Its language is specific as to what was Mare Island. It says:

> "The point which presents the most favorable appearance for the location of a great Naval establishment, is Mare Island, on the north of the entrance to Carquinez Straits, and bounded on the east by Mare Island straits, which separates it from the City of Vallejo on the west by the Bay of San Pablo, and on the north by a large tract of tule land, extending several miles in the direction of the valley of Sonoma. The surface of this Island at the south end is broken and elevated, some of the hills rising to the height of 280 feet, but at the north end it is more uniform and may be easily reduced to a convenient grade. A careful survey of this Island and Straits has been made, and the soundings and elevations of the land will be seen on plan No. 7." (R. III—26)

First, the Court will note that Plan No. 7 is "a careful survey of this Island". In other words, Mare Island is

what is shown on this plan and it does not include the tule marsh now claimed by the government.

Next, the Court will note that the boundaries of the island are stated by the Board. The eastern boundary, which obviously is not a part of Mare Island, is stated to be Mare Island Straits. Similarly, the western boundary, which likewise is not a part of the island, is stated to be San Pablo Bay. Finally, the northern boundary—not the northern part of the island—is stated to be the tule land "extending several miles in the direction of the Valley of Sonoma". The very fact that the tule is referred to as a boundary of the island eliminates it as a part of the island itself.

Next, the Court will note that the "north end" of the island is said to be more uniform than the southerly end "and may be easily reduced to a convenient grade". Manifestly, the Board was not speaking of the tule marsh when it was speaking of reducing the surface of the island to a convenient grade. The description of the relatively flat area of the northerly end of the high land as the "north end" of the island was consistent with the previous description of the northerly boundary as being the tule marsh.

Further along in the report we find these important passages:

> "Mare Island contains, including the tule opposite Vallejo, about 900 acres, all of which it is desirable that the Government should possess, though it is not proposed to occupy the whole of this large area for the Yard. A portion will be required for Hospital, Magazine, Barracks and Coal Depot, while the

high lands at the south end can be used for grazing Government stock and may be advantageously occupied by works of defence.

* * *

"Plan No. 8 presents the arrangements proposed; the line of wharf front is in deep water, there being generally a sufficient depth for the largest ship of the line to lie in safety; this line is in the direction of the current, and extends the whole length of the island, a distance of about two miles." (R. III—32-33)

The statement that Mare Island, including the tule opposite Vallejo, contains about 900 acres should put to an end all claim that the lands here in suit were considered a portion of the island. The very mention of the tule opposite Vallejo, without including the 8 miles of tule up toward Sonoma Creek, would eliminate the latter, as does the statement of over-all area. Even more eloquent, if that be possible, is the statement that the whole length of the island is about two miles. This obviously could refer only to the high land. Had the tule marsh to the northwest been included, the distance would have been ten miles. Furthermore, Plan No. 8 at page 2 of Volume IV of the record shows the plan for the naval establishment and shows the wharf referred to, which extends only along the high land. We ask the Court to observe particularly the northwesterly end of the wharf line because, as the report says, this wharf line extends "the whole length of the island".

It is respectfully submitted that these references by the Sloat Board do not admit a reasonable difference of opin-

ion as to what was known and thought to be Mare Island. The report is, throughout, absolutely inconsistent with any view other than that the high land, and the high land alone, was what was known and referred to as Mare Island.

The Confirmation Proceedings.

This brings us to the confirmation proceedings. They disclose, as does the other evidence, that all that was granted or confirmed was the place called Mare Island.

The entire proceedings before the Board of Land Commissioners is set forth in the first 70 pages of Volume V of the record. These include Castro's petition, the grant to him, the petition to the Board, the evidence taken, the Board's opinion and its decree. This evidence is important.

We start with Castro's petition. In order that he might have a refuge from the depredation of the Indians Castro asked for "an adjacent Island in the bay of San Francisco called 'Mare Island' which has no owner". (R. V—36) Investigation disclosing that the island was vacant and subject to grant (R. V—36-37), Governor Alvarado made the grant in 1841. (R. V—38) The translation of it recites Castro's petition "for the ownership of the Island named 'La Yegu' situate in the neighborhood of the Straits of Carquinez" and the grant to him "of the said Island in all its extent". (R. V—39) In other words, Castro asked for the island called or named Mare Island and Alvarado granted him all that he asked for.

The petition to the Board of Land Commissioners showed that Bissell and Aspinwall had purchased Castro's

claim and they petitioned "for the Place named 'Isla de Yegua' or 'Mare Island' ". (R. V—2) The petition states the provisional grant to Castro "of the Island called 'Isla de la Yegua' in the present County of Sonoma" and the final grant in fee of "the said tract of Land Mare Island". (R. V—4)

The entire record before the Board shows that the only question that was raised was as to the validity of the grant. No question as to its extent was either presented or considered. The Board's opinion discloses that the only question decided was that the grant was valid and even this conclusion was reached only with difficulty. (R. V—67-69) The only evidence before the Board as to the extent of the grant was the testimony of General Vallejo, who described the island as lying at the mouth of Napa Creek, being about two and one-half miles long and of irregular width and containing about half a league of land, a little more or less. (R. V—22-23) We have already pointed out (page 5, *supra*) that this description fits with considerable accuracy the high and dry land called Mare Island and is wholly inconsistent with the claim that the lands in Survey 569 were a part of the island. We shall not repeat that discussion here.

It therefore appears on the face of the confirmation proceedings that all that Castro asked for and all that was granted to him was the place named or called Mare Island. The only place ever called or known by that name was the high and dry land. Moreover, under the Mexican law, which was the law of the grant, only the land down to the line of highest high-water throughout the year

passed by virtue of the grant and that, again, included only the high and dry land.

It is respectfully submitted that upon the record the decree of the majority below cannot stand. Not only have the findings of the trial court, supported by the overwhelming weight of the evidence, been ignored, but a construction has been given to the confirmation decree which is plainly in conflict with the record upon which it was made and erroneously multiplies the area that was granted and confirmed more than five-fold. This was pointed out by the dissenting opinion, which the majority refused to heed.